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Supreme Court of the United States

OCTOBER TERM, 1967

No. 861

BROTHERHOOD OF RAILROAD TRAINMEN, SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners*

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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OPINIONS BELOW

The opinions of the District Court (Appendices A and B)[2] are reported at 250 F. Supp. 691 and 252 F. Supp. 207. The opinion and supplemental opinion of the Court of Appeals (Appendices E and F) have not yet been officially reported.[3] They are unofficially reported at 65 LRRM 2229 and 65 LRRM 2995.

JURISDICTION

The judgment of the Court of Appeals (Appendix G) was dated and entered on July 31, 1967. On October 16, 1967, the time for filing this petition was extended to November 28, 1967 by order of this Court. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Whether rules relating to the manning of train crews in road and yard service (commonly known as "crew consist" rules), which were established by or pursuant to the Award of Arbitration Board No. 282 convened under Public Law 88-108, or by agreements entered into during the period of the Award which specified that such rules were to remain in effect to the same extent and for the same period as rules estab-

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[2] The appendices to this petition are contained in a separate document which has been filed in this Court in common by three of the parties filing petitions for writ of certiorari to review the judgment of the Court below.

[3] On September 21, 1967, the Court of Appeals issued a third opinion. (Appendix H) It is unofficially reported at 66 LRRM 2268. Although it nominally refers only to the appeals involving the Brotherhood of Locomotive Firemen and Enginemen, it is pertinent also to the case of the Petitioners.

lished pursuant to the Award, continue in effect after the expiration of the Award notwithstanding the language of Public Law 88-108 that the award of the arbitration board was to continue in force for a period "not to exceed two years from the date the award takes effect", notwithstanding the legislative history of that Act which shows the Congressional intent that the rules remain in effect only for two years, and notwithstanding the language of the Award that it was to "continue in force for two years from the date it takes effect."

2. Whether Section 6 of the Railway Labor Act requires that crew-consist rules that were modified pursuant to agreements entered into during the effective period of the Award of Arbitration Board No. 282 and which provided that they were to remain in effect only for a limited specified duration nevertheless continue in effect after the expiration of the specified period.

3. Whether the Award of Arbitration Board No. 282, which became effective with respect to the Petitioners at the expiration of January 24, 1964, and which was to remain in effect for a period "not to exceed two years," terminated at the end of January 24, 1966 or at the end of January 25, 1966, when the starting date did not involve problems of a fraction of a day.

4. Whether the exchange of certain correspondence between one of the Respondent railroads (Richmond, Fredericksburg & Potomac) and one of the Petitioners (Brotherhood of Railroad Trainmen) constituted an agreement establishing a change in prior crew-consist rules, when the parties never agreed on the duration of the agreement.

STATUTES INVOLVED

The pertinent provisions of Public Law 38-108 (77 Stat. 132, 45 U.S.C. § 157 (1966 Supplement)) and the Railway Labor Act (48 Stat. 1185, 45 U.S.C. §§ 151-164) are set forth in Appendix J. The provisions of the Award of Arbitration Board No. 282 are set forth in Appendix I.

STATEMENT

On August 28, 1963, following almost four years of failure by most of the railroads, including the Respondents, and the five operating unions, including the Petitioners, to settle their dispute concerning the manning of trains, Congress enacted Public Law 88-108. The dispute involved, *inter alia,* two separate manning issues. The first issue concerned the use of firemen (helpers) on diesel locomotives (R 4), and the second issue concerned the consist of train crews in road and yard service. (R 3) It is the latter issue that involved employees represented by the Petitioner.

The history of the crew-consist dispute is set forth in detail in *Brotherhood of Locomotive Firemen and Enginemen, et al.* v. *Chicago, Burlington & Quincy R.R., et al.,* 255 F. Supp. 11 (D.D.C., 1964); *aff'd.* 331 F. 2d 1020 (D.C. Cir. 1964), *cert. den.* 377 U.S. 918. In brief, on November 2, 1959, most of the railroads in the country served notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156) of their intent to abolish all rules concerning crew consist and on September 7, 1960, the unions served counter Section 6 notices proposing different crew-consist rules. The dispute was not settled by negotiations between the parties either locally or on the national level. (R 4-5) Thereafter, spanning a period of several years, a Pres-

idential Railroad Commission was appointed by the President of the United States to investigate and report on the controversy, the mediatory services of the National Mediation Board were invoked and exhausted, and the President of the United States, acting under Section 10 of the Railway Labor Act (45 U.S.C. Section 160), appointed an Emergency Board to investigate and report concerning the dispute. (R 5) No agreement was reached. The matter came to a head in July and August 1963 when the railroads announced that they intended unilaterally to put in effect the proposal in their November 2, 1959 notices, and the unions announced that a strike would be called if the railroads did so. (R 21) To prevent such unilateral action by the railroads and its consequent strike by the unions, Public Law 88-108 was enacted. (R 21; Appendix J.)

Section 1 declared that neither the railroads nor the unions could make any changes in the status quo except by agreement or pursuant to the arbitration award provided for in the Act as to any matters which were the subject of the Section 6 notices of November 2, 1959 and September 7, 1960.

Section 2 of P.L. 88-108 provided for the creation of an arbitration board. Section 4 provided that its award was to continue in force for such period as the arbitration board should determine in its award, "but not to exceed two years from the date the award takes effect, unless the parties agree otherwise." Section 5 of the Act provided that the award was to become effective 60 days after filing the award.

Section 8 provided that the Act would expire 180 days after its enactment, except that it would remain in effect with respect to the last sentence of Section 4 (which dealt with the duration of the arbitration award) for

the period prescribed in that sentence (i.e., "not to exceed two years from the date the award takes effect, unless the parties agree otherwise.")

Pursuant to the provisions of P.L. 88-108, a board of arbitration was convened, which became known as Arbitration Board No. 282. The Board issued its Award on November 26, 1963. (R 41; Appendix J) Section I of the Award provided that its determination with respect to the crew-consist issue was to be a full disposition of the issue of crew consist involved in the parties' Section 6 notices of November 2, 1959 and September 7, 1960. Section II concerned the disposition of the issue concerning the use of firemen (helpers) on other than steam power locomotives.

Section III of the Award dealt with the crew-consist dispute. Section III A(1) remanded the crew-consist issue to the parties for negotiations on the local properties but pending the consummation of local agreements provided that certain interim rules should apply.

Section III A(3) provided that either party could give notice to the other of any proposed change in the preexisting crew-consist rules, and that following such notice the parties were thereafter to meet in an attempt to reach agreement on the notice. Section III Part B(1) provided that if no agreement was reached the issue involved could be referred by either party to a "special board of adjustment". Section III Part B(3) provided that the determination by the special board of the dispute was to be binding on the parties.

Section IV of the Award provided that the Award was to "continue in force for two years from the date it takes effect, unless the parties agree otherwise." Arbitration Board No. 282 filed its Award on November

26, 1963, and in accordance with Section 5 of P.L. 88-108, the Award became effective commencing with January 25, 1964. (R 9)

Utilizing Section III of the Award, almost all the Respondents served notices on the Petitioners of their proposed changes in the preexisting crew-consist rules. Negotiations were conducted on the local properties and in many instances agreements were reached. These agreements varied with respect to the duration of the agreements. (R 65-70) In many other instances agreement was not reached and the disputes were referred to special boards of adjustment, as provided in Section III of the Award, and awards were issued. (R 62)

On January 19, 1966, 178 railroads[4] filed a complaint for declaratory judgment and injunctive relief against the Petitioners and the Order of Railway Conductors and Brakemen requesting the District Court to declare that the rules and procedures established by or pursuant to the Award of Arbitration Board No. 282, whether by way of awards of special boards or through agreements, continued in effect upon the termination of the Award until changed by agreement or until the procedures provided by the Railway Labor Act have been exhausted with respect to notices proposing changes in such rules and procedures. (R 2-17) On February 16, 1966 the Petitioners filed their Answer and Counterclaim in which they requested the Court to declare that the rules which were modified by or pursuant to the Award were again in effect upon the termination of the Award.

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[4] On February 3, 1966, the railroads filed a Notice of Dismissal by Certain Plaintiffs dismissing the action with respect to 33 of the railroads. (R 17)

On March 3, 1966 the District Court delivered its first opinion. (R 153-167; Appendix A) The Court held that upon the termination of the Award no further proceedings could be taken under the Award. However, the Court held that rules established under the Award created a "new plateau" and that such rules continued in effect following the termination of the Award.

On March 25, 1966 a final hearing was held. The purpose of the hearing was to determine the application of the Court's March 3, 1966 rulings to specific situations, such as the effect of the termination of the Award on agreements entered into during the period of the Award and on proceedings initiated before the termination of the Award but not completed at the time the Award expired. The parties filed an extensive Stipulation As To Facts, together with exhibits, and no further evidence was introduced. (R 62-111) On March 28, 1966, the District Court rendered its oral opinion with respect to these remaining issues (R 167-174; Appendix B), and on April 6, 1966 entered judgment with respect to all issues. (R 175-181)

The District Court found that the rules established pursuant to the awards of special boards of adjustment continued in effect upon the expiration of the Award, and that, with the exception of three agreements, all agreements made during the period of the Award were to be treated as if they were awards of special boards of adjustment and the agreements also continued in effect upon the expiration of the agreements. The District Court further held that the Award expired at the end of January 25, 1966 solely because the parties had on several occasions referred to that date as the expiration date.

The Court of Appeals affirmed the holdings of the District Court set forth above. It based its legal underpinning that the rules created by the awards of special boards and the agreements of limited duration continued in effect upon the expiration of the Award of Arbitration Board No. 282 and the expiration of the agreements "not [on] the Joint Resolution which expired after 180 days of life," not "on the Award, which had only a 2-year life," and not because of "any agreement of the parties." (App. p. 45a) Rather, the Court's rationale was that the Railway Labor Act required such result. The Court stated (App. p. 45a):

> "The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. . . . This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. . . . It likewise applies even though the work rules are established by an arbitration award of limited duration."

With respect to the issue of the date the Award expired, the Court of Appeals, in its first Opinion (App. p. 40a), reversed the District Court and held that the Award expired at the end of January 24, 1966. In its Supplemental Opinion, however, the Court of Appeals reversed itself and found that the Award expired at the end of January 25, 1966. (App. p. 86a) The Court explained its earlier ruling that the Award expired January 24, 1966, on the ground that the starting date of the Award did not involve the problem of a fractional day. The Court concluded, however, that it felt compelled to reject its own reasoning because of a "horn-

book learning to the effect that where there is doubtful language in a statute the courts prefer that will confirm rather than destroy any bona fide transaction or title," and that since a special board of adjustment rendered an award on January 25, 1966, its construction should be given effect (App. p. 85a) without there being any indication that the special board had given any construction or any consideration to the "two years" provision.

REASONS FOR GRANTING THE WRIT

I. The question of the work rules to be in effect upon the expiration of the Award of Arbitration Board No. 282 involves an important issue affecting the employment rights of thousands of persons and which was decided erroneously by the Court below.

Utilizing the provisions of the Award of Arbitration Board No. 282, the Respondents, within the space of two years, and with a zeal unimagined by Arbitration Board No. 282,[5] extinguished the employment rights of 18,000 employees under the part of the Award dealing with the use of firemen (helpers) on diesel locomotives, and received authorization to discontinue approximately 7,574 job assignments under the part of the Award dealing with crew consist. (R 142)

The Petitioners contended in the Court below that based upon the language of Public Law 88-108, its legislative history, the language of the Award of Arbitration Board No. 282, and a decision of this Court, the only conclusion that could be drawn was that both the Congress and the Arbitration Board intended that the work rules created by or pursuant to the Award

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[5] Testimony of Ralph T. Seward, Chairman of Arbitration Board No. 282, in Hearing Before the Committee on Commerce, U.S. Senate, 89th Cong., 1st Sess., *On the Administration of Public Law 88-108,* pp. 363-364.

were to be interim rules only and were intended to remain in effect only for the period that the Award was effective and that upon the expiration of the Award the prior agreed-to rules that were modified by the Award were automatically again in effect, absent agreement to the contrary.

The Petitioners pointed to the language of Section 4 of Public Law 88-108 which provided (App. p. 114a):

> "The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise."

And to Section IV of the Award of Arbitration Board No. 282 which provided (App. p. 110a):

> "This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise."

The Petitioners also cited numerous statements of representatives of the Administration proposing the legislation and the parties to the dispute taken from testimony given at the hearings before the House and Senate committees considering the legislation that became Public Law 88-108, the reports of the Senate and House committees reporting the bill, and numerous statements of members of the Congress during the floor debates on the legislation, all to the effect that the work rules created pursuant to the legislation would continue in effect only for a two-year period at the most.

Finally, the Petitioners cited the opinion of this Court in *Bhd. of Locomotive Engineers* v. *Chicago, R.I. & P.R.R.*, 382 U.S. 423 (1966), wherein this Court,

in discussing the Award of Arbitration Board No. 282, stated (at 433):

> "Their award was to be a complete and final disposition of these issues for a period not exceeding two years from the date the award would take effect . . . .
>
> ". . . Congress wanted to do as little as possible in solving the dispute which was before it . . . ."

Notwithstanding all the evidence to the contrary, the Court of Appeals rejected the position of Petitioners on the ground that the legislative history was unclear on the subject. The Court referred to no provision of Public Law 88-108, the Award, or to any legislative history, to support its conclusion that there was doubt of the intent of Congress or the Arbitration Board as to the maximum period the rules created pursuant to the Award would be in effect. Indeed, the Court conceded that the approach of the Petitioners:

> "has a kind of formal logic, and certain provisions of Public Law 88-108 could be read this way." (App. p. 45a)

The Court made no attempt to reconcile its holding that the work rules established by the Award were to be controlling for a *minimum* period of two years and that the rules thus established created a "new plateau" which was to continue upon the expiration of the Award, with the clear mandate of Congress that the Award was to remain in effect for a period "not to exceed two years", or with the Award which provided that it was to "continue in force for two years from the date it takes effect."

We are aware that a petition for certiorari is not the proper place for a detailed argument on the merits. For this reason we have omitted the numerous references to the legislative history of Public Law 88-108

which support our position. Our purpose here is only to show that there is at least a serious doubt that the Court of Appeals was correct in its construction of the statute and the Award. When such doubt is coupled with the great impact such determination had upon the employment rights of thousands of persons, we believe such determination is the proper subject of review by this Court.

We further submit that review is necessary because the Court of Appeals itself was not at all sure of the correctness of its determinations. The confusion and uncertainty of the Court below is apparent from the fact that the Court found it necessary to issue from time to time three separate opinions. The first opinion (Appendix E), of 41 pages, concluded with the unusual direction that the parties submit proposed judgments to the Court of Appeals with leave to the parties to "request supplemental rulings on any matters that have not been discussed in this opinion."

The result of this unusual request was a second opinion (Appendix F), of 19 pages, containing clarifications of prior rulings, a reversal of at least one ruling made in the first opinion which in turn had reversed a ruling of the District Court, and rulings on several additional matters not mentioned in the first opinion. These two opinions, however, still were found insufficient to resolve the matter and a third opinion issued. (Appendix H.)

In this final opinion, if indeed it be the final opinion, the Court practically conceded that it was uncertain whether its prior decisions were correct, and, in effect, invited Arbitration Board No. 282 to render its opinion with respect to the various rulings of the Court. The Court stated (App. p. 93a.)

> "It is Ordered by the court that the carriers petition of August 15, 1967 is denied, without prej-

udice however to the Board's seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of respects, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award."

On September 12, 1967, the National Mediation Board sent telegrams to all persons who had been members of Arbitration Board No. 282 reconvening the Board to "consider what action if any to take in light of the memorandum and order" of the Court of Appeals. On October 19, 1967, Arbitration Board No. 282 advised the Court that it declined to file a brief amicus.

In any event, the correctness of the decision of the Court below adversely affecting such a very large number of persons, should not have been dependent on whether Board 282 agreed with the Court of Appeals' conclusions. The only forum which has the statutory power to review such decisions is this Court, and, we submit, in light of the confusion and uncertainty of the Court below, this Court should exercise such power of review.

II. Whether parties subject to the Railway Labor Act may effectually make agreements of limited duration presents an important question of the construction of the Railway Labor Act which ought to be decided by this Court.

Question No. 2 presents the issue of whether parties subject to the Railway Labor Act may effectually enter into an agreement pursuant to which the agreement will expire on a day certain with its terms no longer to have any force or effect after the expiration date. The Court below held that the parties may not do so effectively and that the consequence of the Railway Labor Act is "to prolong agreements subject to its

provisions regardless of what they say as to termination." (App. p. 46a.)

The issue arose in this case in the following manner. Section III A(3) of the Award of Arbitration Board No. 282 provided that either party to the Award could give notice to the other of any proposed change in the preexisting crew-consist rules and that following such notice the parties were to meet in an attempt to reach agreement on the notice.

Approximately 95 agreements were entered into following such negotiations. The agreements varied considerably with respect to the dates on which they were to terminate. The parties were able to stipulate that, with the exception of 13 agreements, all agreements could be classified within one of five categories. (R 65-66) The instant question is not concerned with the agreements in these categories.

The parties could not agree on a category for the remaining 13 agreements, however, and these were presented individually to the Courts below for consideration.[6] The Petitioners contended, with respect to these

[6] The relevant portions of these agreements are set forth in paragraph F of the Stipulation as to Facts entered into between the parties in the District Court. (R 66-70) Actually, only 10 agreements were presented to the Court of Appeals for adjudication. The District Court upheld the position of the Petitioners with respect to three of the agreements. With respect to these three agreements the District Court held that the prior crew-consist rules again became effective because these agreements "contain an express provision to the effect that upon their expiration the prior rule as to crew consist would again be in full force and effect." The Respondents did not appeal from this ruling. Under the reasoning of the Court of Appeals, however, it may be that if they had appealed, the Court would have reversed the District Court on the ground that a Section 6 notice was required to return to the old rules notwithstanding the express provisions of such agreements to the contrary.

agreements, that each agreement showed the intent of the parties that the crew-consist rules established pursuant to the agreement were intended to be in effect only for the limited period of the agreement and that upon its expiration, the prior agreed-upon crew- consist rules were again to be in effect.

The Court of Appeals rejected the Petitioners' contention holding that Section 6 of the Railway Labor Act superseded the intent of the parties and, regardless of what the parties intended, the agreements continue in effect until the procedures of the Railway Labor Act for changing agreements are resorted to. The Court stated (App. pp. 45a-46a.)

> "The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These procedures begin with the notices required by Section 6 to be served by any party *seeking a change* at least thirty days in advance of the proposed effective date of such change. This new plateau reasoning applies even though the work rules are established by agreements of limited duration. The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination."[17]

[17] Manning v. American Airlines, Inc. *supra*, note 15, 329 F.2d at 34.

For example, the agreement with the Kansas City Southern provided (R 67-68):

> "This agreement does not affect schedule rules . . . in effect on the day preceding the effective date of this agreement except . . . for the period this agreement remains in effect . . . This agreement . . . shall remain in effect until January 25, 1966 . . . ."

Yet the Court below held that the agreement remained in effect after January 25, 1966 and that the "schedule rules . . . in effect on the day preceding the effective date of" the agreement continued to be modified after January 25, 1966, despite the express agreement of the parties to the contrary.

We submit that the error of the Court of Appeals is evident from its own analysis. Thus, the Court began its analysis by referring to the fact that Section 6 of the Railway Labor Act requires that notice be served whenever a party seeks "to institute a unilateral modification" of an existing agreement. There is no question that the Court below is correct on this point and that a Section 6 notice is required whenever one of the parties to an agreement desires to change the existing collective bargaining agreement. Under such circumstances, a notice is required so that the other party to the agreement is made aware of the proposed change in order that negotiating conferences can be scheduled to discuss the proposal, and so that, if no agreement can be reached on the property, the dispute may be referred by any of the parties to the National Mediation Board for its mediatory services in attempting to settle the dispute.

Immediately following this statement, however, the Court below concluded, from the fact that a notice is required when a "unilateral modification" is intended, that "the effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination."

We fail to find any provision in Section 6 that would require notice to be served when both parties to the agreement state in the agreement that it shall remain

in effect for a certain period, and not thereafter. In such situation, the expiration of the agreement does not constitute a unilateral modification of the agreement but rather the culmination of what the parties had agreed. Here, since the parties to the agreements involved specified that crew-consist rules be in effect only until a specified date, the revival of the rules in effect prior to such agreements is not a *change* in such agreements but is part of such agreements.

III. The Court below clearly was in error in holding that the Award of Arbitration Board No. 282 did not expire at the end of January 24, 1966.

The question of whether the Award of Arbitration Board No. 282 expired at the end of January 25, 1966 is relevant only to two of the Respondents. On January 25, 1966 a special board of adjustment rendered an award with respect to a dispute between the Green Bay and Western Railroad Company, the Kewanee, Green Bay and Western Railroad Company, and the Brotherhood of Railroad Trainmen. (R 63) The Court of Appeals' determination of this issue is, perhaps, the outstanding example of the confused and uncertain handling of this case by that Court.

The District Court had held that the Award of Arbitration Board No. 282 expired at the end of January 25, 1966 and therefore the special board award was valid, simply because the Court and the parties often referred to the Award as expiring on that date. (R 151)

In the first opinion of the Court of Appeals the Court reversed the District Court, noting (App. p. 40a):

> " "The parties and the District Court have all accepted and implemented the Award as effective January 25, 1964. With that date marking the first day of the two year period it is clear that the

> full two-year period expired at the end of January 24, 1966. We see no valid basis for the assumption of the District Judge that the Award was in existence on January 25, 1966."

The Court concluded that the award of the special board issued on January 25, 1966 was invalid.

The Court of Appeals changed its mind in its second opinion, follwoing a request by the Respondents for a rehearing of the issue. The Court pointed out, however, that its reason for reversing itself was not based on any argument put forth by Respondents. The Court stated (App. pp. 84a-85a):

> "On rehearing the carriers point out decisions interpreting statutory provisions that an act be done within a specified period from the date of another action or event so that the initial or trigger date is excluded from the computation . . . .We thought this rule inapplicable because the starting date did not involve problems of a fractional day, and was in turn determined by a still earlier computation beginning with an initial date that was concededly excluded from the computation. This led us to view that the two-year period prescribed by the Act as the life of the Award did not extend beyond 731 full days (two years of 365 days each, plus February 29, 1964) and that the Award which started at 12:01 a.m. on January 25, 1964, should not be stretched to include the 732nd day of January 25, 1966. We felt that in this peculiar setting of this law that legislative consideration should prevail over the customary formula for computing time."

Notwithstanding "legislative consideration" the Court nevertheless found that the special board award was valid. The basis of the decision was (App. p. 85a):

> ". . . hornbook learning to the effect that where there is doubtful language in a statute for per-

formance of an act, the courts prefer that which will confirm rather than destroy any bona fide transaction or title. 52 Am. Jur. *Time* § 18 (1944).

". . . When the special board assumed that it had authority to act on January 25, 1966, it must be presumed to have considered the question carefully and with a view to conforming to the intent of Congress as nearly as it could discern that intent."

There is not a word anywhere to substantiate such presumption.

The Court below took pains to reject the Respondents' contentions, concluding that the effective date of the Award did not involve a fractional day, that the Award should not be stretched to include an additional day, and that legislative consideration should prevail over the customary formula for computing time. It then discarded its entire analysis, finding "doubtful language in a statute." What doubtful language? The careful analysis of the Court shows that there is no doubtful language at all on this subject.

The third opinion of the Court of Appeals shows its uncertainty. In the third opinion, the Court refers to its holding on this point and immediately thereafter orders that its mandate be stayed to permit Board 282 to advise in what respects, if any, "the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award." (App. p. 93a.)

On October 19, 1967, Board 282 advised the Court below that it would not take advantage of the Court's offer. (See p. 14, *supra.* If it had, however, we have no doubt of what it would have had to say on this point. The fact is that Board 282 consistently took the posi-

tion that it would not determine questions of a legal nature concerning the termination date of the Award or the effect of the termination of the Award. For example, on June 9, 1964, Arbitration Board No. 282 rendered a response to a question which had been submitted to it by the Switchmen's Union of North America. The question of SUNA and the answer of Board 282 are, in pertinent part, as follows:

> "Question III. In the event the Carriers serve notice under Caption III Consist of Road and Yard Crews, . . . or if procedures under Part B are not completed or decisions of special boards of adjustment have not been rendered under B-3 on the date Arbitration Board No. 282 terminates:
>
> > "Do all procedures terminate on the date the Board terminates?
> >
> > "Are all decisions which may be rendered by a neutral subsequent to the date the Board terminates void?
> >
> > "Answer: These questions do not call for an interpretation of the Board's Award. They call for an opinion as to the legal situation which exists following the termination of the Board's Award. The Board therefore lacks jurisdiction to answer them."

Since Board 282 took the position that it did not have jurisdiction to determine questions of a legal nature there can be no doubt that it did not intend that special boards of adjustment deliberate or rule on the matter. The Court below clearly was in error both in presuming that the special board "considered the question carefully," and in giving any weight to the coincidental fact that the award of the special board issued on January 25, 1966.

IV. The Court below was clearly in error in holding that the correspondence between the Richmond, Fredericksburg & Potomac Railroad Company and the Brotherhood of Railroad Trainmen constituted a crew consist agreement of the same duration as an award by a special board of adjustment.

Should this Court decide to review the basic determinations of the Court below, we request this Court to review also the lower Court's holding with respect to the issue involving the Richmond, Fredericksburg & Potomac Railroad Company ("RF&P") and the Brotherhood of Railroad Trainmen, which holding violates the most fundamental principles of contract law.

The issue is whether certain correspondence between the RF&P and the Brotherhood constituted a crew-consist agreement. The Brotherhood's position is that the correspondence clearly shows that the parties could not agree and no agreement was made. The correspondence was included in the Stipulation as to Facts (R. 80-90).

Although the issue was thoroughly briefed and argued by counsel for the parties, the first opinion of the Court below ignored the issue entirely. The Brotherhood called the Court's attention to this fact and in the Supplemental Opinion of the Court of July 31, 1967, the Court ruled on the issue. The Court held (App. p. 90a, fn. 6) that the correspondence constituted a crew-consist agreement of the same duration as an award by a special board of adjustment. We submit that the holding of the Court below was so clearly in error, that if this Court determines to review any aspect of the case, it should not permit this determination to stand.

The last correspondence on the matter between the RF&P and the Brotherhood plainly shows the gulf

separating the parties and their failure to enter into a binding agreement. On November 9, 1964, the representative of the Brotherhood sent a letter to the RF&P which concluded with the following paragraph (R. 89-90):

> "The effective date of this agreement forced upon us is November 15, 1964, and as far as I am concerned, it expires on January 25, 1966 unless we agree otherwise in accordance with Article IV, Duration of Award Arbitration Board No. 282 and at present I do not agree otherwise."

The RF&P's response is dated November 12, 1964. The carrier's letter states (R. 90):

> "On November 15, 1964, that agreement will be placed in effect with the understanding that there is a difference between the parties on the duration of the agreement. The opinion of the RF&P on the issue of agreement duration is outlined in my letter to you of November 5, 1964, while your opinion is expressed in your letter to me of November 9, 1964.
>
> "As far as the RF&P is concerned this concludes our handling of the subject agreement at this time."

Thus, at the termination of the correspondence the situation existing was that both parties believed that they were making an agreement but not the same agreement. The Brotherhood stated it was making an agreement which by its terms was to expire on January 25, 1966 whereupon the prior crew-consist rules were again to become effective. The RF&P, on the other hand, stated it was making an agreement which would be the same as any other agreement made by the parties which

does not include a specific termination date. This difference persisted through all the correspondence which the Court below found to constitute an agreement.

CONCLUSION

At least some of these issues are of far-reaching effect and apparently decided erroneously by the Court below. It is urged that this petition be granted.

Respectfully submitted,

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November, 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Petitioners,

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY,
ET AL., *Respondents.*

No.

ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN,
Petitioner,

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY,
ET AL., *Respondents.*

No.

THE AKRON & BARBERTON BELT RAILROAD COMPANY,
ET AL., *Petitioners,*

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
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APPENDICES TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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APPENDICES TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX A

Opinion

Francis M. Shea and Richard T. Conway, both of Washington, D. C., for the plaintiffs.

Milton Kramer, of Washington, D. C., for defendants Brotherhood of Railroad Trainmen, et al.

James D. Hill, of Washington, D. C., for defendant Order of Railway Conductors and Brakemen.

This is an action brought by a group of railroads against several organizations of railway employees for an injunction against calling a strike and for a declaratory judgment. The suit was instituted in the light of the termination of the effective period of two years, of an award of a compulsory arbitration directed by Congress in respect to certain issues in controversy between the parties. A temporary restraining order was granted at the institution of this action and has been extended by consent to continue until after the trial.

Pursuant to a pretrial order made with the consent of the parties a hearing has been held on the following two basic issues in advance of the trial: (a) the effect of the expiration of the period during which the Award of Arbitration Board No. 282 continued in force, as provided in Section IV of that Award pursuant to Section 4 of Public Law 88-108; and (b) whether the Norris-LaGuardia Act is applicable to the plaintiffs' request for injunctive relief. This decision deals with these two questions.

At the outset it is desirable to analyze and summarize the somewhat complicated system prescribed by the Railway Labor Act (Act of May 20, 1926, 44 Stat. 577, as amended, 45 U.S.C. §§151 *et seq.*) for amicable adjust-

ments of labor disputes in the railroad industry. The statute contains a well conceived, carefully planned, elaborate scheme for the settlement of differences between carriers and their employees by means of negotiation, mediation, and arbitration. It provides in detail certain specified steps to be pursued in chronological order when such a controversy arises. Neither employers nor employees may unilaterally make or insist on any changes in agreements affecting rates of pay, rules, or working conditions, without first exhausting the remedies provided by the Act.

The initial step to be taken either by a carrier or an organization representing employees, in the event that it desires an alteration in an existing arrangement, is to serve a 30-days' written notice of its intention to achieve the change. The time and place for the beginning of conferences between the representatives of the parties, are then to be agreed upon within ten days after the receipt of the notice. The date of the first conference must be within the 30-day period provided in the notice, Railway Labor Act, Sec. 5, 45 U.S.C. §155.

The Act further provided for the creation of the National Mediation Board appointed by the President, Railway Labor Act, Sec. 4, 45 U.S.C. §154. If the negotiations between the parties do not result in a settlement of the dispute, either party is authorized to invoke the assistance of the Mediation Board. In addition the Mediation Board is empowered to proffer its services on its own initiative, in case of an emergency.

If the negotiations and mediation still do not lead to an adjustment of the controversy, it may be submitted to a board of arbitration by agreement of the parties, Railway Labor Act, Sec. 7, 45 U.S.C. §§157, 158. While such an arbitration is purely voluntary, the statute prescribes the manner of creation and organization of such a board

and the procedure to be followed by it. The award is binding and enforcible.

If either party declines to submit to arbitration and the controversy remains unsettled, and if the National Mediation Board is of the opinion that the dispute would substantially threaten to interrupt interstate commerce, the Board is required to notify the President. The Board is also to notify the parties that its mediation efforts have failed. No change may then be made by the parties for 30 days. An Emergency Board may then be appointed by the President to investigate the dispute. The Emergency Board must report to the President within 30 days from the date of its appointment. After the creation of such Board, and for 30 days after the Board has made its report, no change except by agreement may be made by the parties in the conditions out of which the dispute arose.

At the expiration of the last mentioned 30-day period the remedies provided by the Railway Labor Act are exhausted. If the dispute still remains unresolved, presumably either party may act unilaterally and resort to self help. To state it more bluntly, the railroads may then proceed to make the desired changes in rates of pay, rules or working conditions, or discharge employees whom they deem unnecessary. On the other hand, representatives of the employees may call them out on strike. Industrial strife is in the offing. If the dispute is on a sufficiently large scale, the possibilities of serious detrimental and even disastrous effects to the public, are readily envisaged. Lack of any further safeguard after the last stage of the statutory arrangement is passed, is the Achilles' heel of the enlightened and beneficent plan provided by the Railway Labor Act. This possible contingency is manifestly inescapable. It was hoped and even expected that the controversy would be settled at one of the earliest stages before the impasse is reached. In most

cases the hope and the expectation proved well-founded. Unfortunately in the nationwide controversy involved in this litigation, they were not realized.[1]

The plan for the amicable adjustment of disputes consisting of a series of successive steps and stages that have been described, is not hortatory or precatory. It is legally binding and enforceable, except that an arbitration cannot be compelled. The leading decision on this subject is *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, in which Mr. Justice Stone (later Chief Justice) wrote an historic opinion, speaking for a unanimous bench. This case breathed the spirit of life into the Railway Labor Act. It overruled the contention of a railroad company that there was no duty to negotiate pursuant to the notices referred to in the statute. The Court held that on the contrary there was an obligation enforceable by legal sanctions to act under the various provisions of the Act. Specifically the Court ruled that it was the duty of the parties to negotiate after notices were served, and that this duty was enforceable by judicial decree. It sustained an order compelling the carrier to do so. On this point Mr. Justice Stone wrote as follows (pp. 548, 552):

> The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without

[1] The Railway Labor Act also established a parallel system for the disposition of another category of controversies, known as "minor disputes", i.e., disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, as distinguished from "major disputes", i.e., controversies concerning what agreements should be reached to govern such matters. For the purpose of determining minor disputes the statute created a National Railroad Adjustment Board, whose duty is to hear and decide such disputes, and whose decisions are legally binding. Any party to such a dispute may refer it to the Adjustment Board, Railway Labor Act, Sec. 3, 45 U.S.C. § 153. In effect, a system of compulsory arbitration was created and has been in operation since 1926.

> which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by §2, First.
>
> • • • • •
>
> The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern.
>
> • • • • •
>
> The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief.

These views were reiterated in *Elgin, J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 719, in which Mr. Justice Rutledge wrote the opinion.

The present controversy had its inception on November 2, 1959, when most of the Class 1 railroads in the United States, many of whom are plaintiffs in the present action, served notices, pursuant to Section 5 of the Railway Labor Act, on organizations of railroad employees, stating that it was their intention to eliminate numerous employees whose services had become unnecessary as a result of technological improvements. Specifically it was proposed to eliminate firemen on diesel engines in freight and yard service, and to reduce the number of members of the train crew on numerous runs. On September 7, 1960, employees' organizations served counter-notices, the purport of which indicated an intention to maintain the existing conditions. As soon as the first group of notices was served, the remedies prescribed by the Railway Labor Act were immediately brought into play: negotiations

took place; the services of the Mediation Board were invoked; and eventually when arbitration was declined, an Emergency Board was created and made its report. During the intervening period, the President appointed a Special Commission which likewise made an investigation and presented a report.

With the creation of the Emergency Board and the submission of its report, all the remedies afforded by the Railway Labor Act were exhausted without avail. As the Supreme Court held in connection with this controversy, the parties were then relegated to self help in adjusting their disputes, *Brotherhood of Locomotive Engineers* v. *B. & O. R. Co.*, 372 U. S. 284. In other words, the railroads were free to dispense with the services of numerous employees in accordance with the proposal contained in their notices of November 2, 1959. On the other hand, the railroad employees were free to strike.[2]

By this time it was August, 1963. The country was confronted with the specter of a nationwide railroad strike, which would paralyze industry. Disaster and havoc were feared. Congress acted expeditiously in order to stave off such a catastrophe. A Joint Resolution was promptly passed, which became law on August 28, 1963, Public Law No. 88-108, 77 Stat. 129. It commanded a compulsory arbitration of the two principal issues in dispute between the parties.

This enactment expressly prohibited any changes in rates of pay, rules, or working conditions covered by the groups of notices respectively served by the carriers and labor organizations, except by agreement or pursuant to an arbitration award. It explicitly prohibited any strike or lock-out (Sec. 1). It directed the creation of an Arbi-

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[2] A brief history of the dispute is contained in the opinion of this Court in *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago, B. & Q. Ry. Co.*, 225 F. Supp. 11, 14-15.

tration Board to pass on two issues: the use of firemen on other than steam-powered locomotives in freight and yard service; and the size and composition of train crews (Secs. 2 and 3). Thus, Congress in effect ordered a compulsory arbitration of these two basic issues. It provided that the arbitration should be conducted pursuant to the applicable sections of the Railway Labor Act, 45 U.S.C. §157-159. The award of the Board was to be binding on the parties. It was to be filed in the United States District Court for the District of Columbia. It was to be in effect for such period as the Arbitration Board should determine, but not to exceed two years from its effective date, unless the parties agreed otherwise. In all other respects, the statute was to expire 180 days from the date of its enactment.

The Arbitration Board, which eventually became known as Board No. 282, was constituted as required by the Joint Resolution, held hearings, and rendered its award on November 26, 1963. The effective date of the award was January 25, 1964. Pursuant to its terms, it remained in effect until Jauary 25, 1966, except that it was extended for a couple of months by agreement in respect to several, though not all, of the organizations of employees.

The pertinent provisions of the award may be summarized as follows. First, the Board held that firemen were no longer necessary on diesel engines in freight or yard service, except as to ten percent of the firemen, who might be needed for exceptional situations. Nevertheless, all firemen regularly employed on the effective date of the award who had a seniority of ten years or more, were to retain their status and were to continue in their employment until death, resignation, retirement, or discharge for cause. In other words, firemen in this group were accorded practically a permanent tenure for the period of their working lives. Firemen who had seniority of between two to ten years were to receive the same rights, with the

qualification, however, that they might be offered other comparable positions for which they were or could become qualified. In that event they were guaranteed five years' service in their new employment. Firemen who had been hired within two years prior to the effective date of the award were not to be entitled to retain their employment or seniority rights, but if their services were terminated, they were to receive a lump sum termination allowance.

The second issue determined by the Board was to fix the size of train crews, referred to in the parlance of the industry as "crew consist". No change was to be made in any stipulated number of members of train crews except by agreement or pursuant to the provisions of the award. Any party was permitted to give notice of a proposed change and if no agreement was reached, the issue could be referred by either party for decision to a Special Board of Adjustment, to be created in the manner prescribed by the award. A series of specific and concrete principles were formulated and prescribed by the award to be followed by these special tribunals.

There has been considerable activity pursuant to the award. Numerous firemen with less than two years' tenure have been separated from the service and received separation allowances. Many firemen who had been employed for periods from two to ten years have been offered other comparable jobs. Some of these men have accepted these offers. Others have declined to do so. In that event the termination of their employment was accompanied by a separation allowance. Some of the firemen who had more than ten years experience, in the natural order of events, retired, resigned, or died. It is not disputed that there has been a considerable reduction in the number of firemen working in freight and yard service on diesel engines. Undoubtedly, many still remain, even though the Board held that all but ten percent of the firemen were surplusage. So, too, numerous steps were taken pursuant to the

award which resulted in the reduction of the size of train crews on many train runs throughout the country.

The question now arises what is the effect of the termination of the effectiveness of the award, and what may the parties do as a result of the fact that the effective period of the award has come to an end. Both the award and the special Act of Congress are silent on this point. There are several possible constructions of the Act in this regard. It is urged in behalf of the labor organizations that the moment the effectiveness of the award comes to an end, it must be deemed a nullity and the *status quo* that existed before the passage of the Joint Resolution of August 28, 1963, is restored. That *status quo* is, as urged by counsel for the labor organizations, that the rules, rates of pay, and working conditions that existed prior to the service of the notices of 1959 and 1960, respectively, came back in effect, and that parties may resort to self help to compel their enforcement. In other words, it is contended that labor organizations may call a strike unless the railroads re-hire the same number of firemen that they had in service previously to August 28, 1963, and restore the size of every train crew all over the country to the size prevailing prior to that date. Were such a construction to be adopted, everything that has been accomplished by the award would be wiped out except that the fatal day will have been postponed for two years.

As heretofore stated, many employees have been discharged, and many jobs have been abolished. It would seem unreasonable to construe the Act of Congress and the award made pursuant to it, as requiring restoration of these positions and a re-hiring of thousands of employees. More than that, if the award becomes a nullity, the permanent tenure that was granted by the award to large groups of employees would be wiped out. The vested rights of an unknown number of employees, probably

large, would be immediately destroyed. This is particularly true of the firemen who had more than ten years' service. Their lifetime security would be abrogated. A question would arise whether the firemen who had accepted comparable jobs with a guaranty of five years' employment, would have a right to insist on the guaranty. Any employee who was re-hired would have to pay back the severance allowance that he had received. Such would be the logical result if the defendants' contention were adopted. As a matter of fact, it would probably be impossible to find immediately a sufficient number of qualified employees to fill the requirements that would be artificially created. Surely Arbitration Board No. 282, composed of eminent and experienced men, could not have contemplated that its work would go for naught, and that the permanent rights accorded by it to thousands of employees would be destroyed at the end of the two-year period. The conclusion is inescapable that the construction urged by the labor organizations is unreasonable and would defeat the very purpose of the legislation and of the award. The Court rejects it.

The doctrine that all statutes should receive a sensible and reasonable construction [3] is equally applicable to the award involved in this case. This Court is of the opinion and concludes that the results of the termination of the effective period of the award of Board 282, are as follows.

No further steps may be taken under the award by either side after its termination date. Thus the railroads may not discharge any more firemen pursuant to the provisions of the award, and they may not initiate proceedings under the award for changing the size and composition of train crews on specified runs. They may not take any other steps under the award. So, too, no new privileges may accrue to employees under the terms of the

[3] *United States* v. *Kirby*, 74 U. S. 482. *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534.

award. On the other hand, what has been accomplished under the award remains and is not to be nullified or wiped out. Any rights that became vested under the award while it was in effect, remain vested. Thus, the firemen with seniority of more than ten years, who were granted a permanent status for their working lives, retain that status. It is not annulled. The firemen who accepted comparable jobs with a guaranty of five years' employment, preserve the guaranty. Members of train crews who were accorded permanent status under the award do not relinquish it. The employees who have received severance pay may retain the money. They are under no obligation to refund it, as they might have been were the award to be regarded as a nullity. If the award were a nullity, a serious question would arise whether an action in quasi-contract for money had and received under a mutual mistake, might not lie in behalf of the carriers against all former employees who received severance pay.

On the other hand, the carriers have a right to maintain the status that existed on the date of the termination of the award. The vacancies caused by the separation of firemen and members of train crews pursuant to the award, may remain unfilled. To require the railroads to go out and immediately find qualified employees to fill the places that have been abolished would be not only unreasonable, but would lead to an absurdity.

The Court is further of the opinion that the steps taken under the award have resulted in the creation of a new status. The fact that the arbitration was compulsory rather than voluntary does not affect the problem. The award of the compulsory arbitration for this purpose must be regarded as taking the place of an agreement within the meaning of the Railway Labor Act. The Act should receive a liberal construction. The parties have arrived at a new plateau as a result of the proceedings under the award.

The conclusion is inescapable that since a new status has been created under the Act, neither side may take any unilateral action or resort to self help. The carrier may not change rates of pay, rules, or working conditions, including size of train crews, employment of firemen, etc., and, on the other hand, the employees may not call a strike or use other coercive measures in order to enforce their demands. If either side desires to bring about any change in the arrangements resulting from the award, it must initiate proceedings by serving notices under Section 5 of the Railway Labor Act and exhaust each step in the procedure prescribed by that statute. The status existing prior to the award is not restored.

Manifestly the Arbitration Board construed the Act as authorizing it to provide for the creation of rights during the effective period of the award that would endure thereafter. It is an elementary principle of statutory construction that the interpretation of a statute by the administrative agency that administers it, is to be accorded great weight and should ordinarily be accepted unless obviously erroneous or unreasonable.

In view of these considerations, any threatened strike may be enjoined and reciprocally the carriers may be required by judicial decree to submit to the invocation of remedies provided by the Act.

A question was raised by counsel as to the status of the notices that some of the employees' organizations have served during the effective period of the award. The Court is of the opinion and concludes that such notices may not be deemed effective as of a date prior to the termination of the award. It would be a futile gesture, however, to require the parties to serve new notices. A reasonable interpretation of the situation is that the notices that have been served may remain, but that they become effective only on the day after the termination of the award. The various proceedings under the

Railway Labor Act need not be initiated until after that time.

The second question to be determined as a result of this hearing, is whether the Norris-LaGuardia Act, 29 U.S.C. §107 bars the granting of an injunction against a strike, and whether any provision of that Act is applicable to an application for such an injunction. At the outset it may be stated that an injunction against a strike may be properly granted to maintain the *status quo,* while the parties pursue the various steps of negotiation, mediation, or arbitration provided by the Railway Labor Act. Such an injunction is one of the means which the courts may invoke to enforce the provisions of the Railway Labor Act. Equity decrees of other types may likewise be employed for similar purposes.

Thus it was said by Circuit Judge Friendly for the Second Circuit, in *Manning* v. *American Airlines, Inc.,* 329 F. 2d 32, 34:

> The propriety of an injunction to enforce the then unique provisions of the Railway Labor Act for maintaining the *status quo* while the parties to a labor dispute pursue various stages of negotiation, mediation or arbitration, was established long ago.

In *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 562-563, which has already been discussed in some detail, it was held in an opinion by Mr. Justice Stone that the Railway Labor Act supersedes the Norris-LaGuardia Act in the sense that the provisions of the Railway Labor Act "cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act".

In *Brotherhood of Railroad Trainmen et al.* v. *Chicago R. & I.R. Co.,* 353 U. S. 30, in which Mr. Chief Justice Warren delivered the opinion for a unanimous Court, it was expressly held that the use of injunctive relief

to vindicate the processes of the Railway Labor Act, as authorized, and that the specific provisions of the Railway Labor Act take precedence over the more general provisions of the Norris-LaGuardia Act (pp. 41-42). A similar conclusion was reached in *Brotherhood of Locomotive Engineers et al.* v. *Louisville & N.R. Co.*, 373 U. S. 33, 39.

The defendants rely on two cases, which however are clearly distinguishable. In *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50, it was held that a railroad was not entitled to an injunction against a strike if it declined to subject itself to one of the remedies accorded by the Railway Labor Act, in that case the machinery for voluntary arbitration. In *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330, it was held that there was no basis for enjoining a strike at the behest of a railroad that had declined to negotiate, because of an erroneous view as to whether it was under a duty to negotiate concerning the subject matter involved in the dispute.

This Court finds no basis for holding that some of the provisions of the Norris-LaGuardia Act may be applicable while others may not be. This Court reaches the conclusion that no provision of the Norris-LaGuardia Act applies to an action or an application for an injunction against a strike of railroad employees if the defendants have failed to fulfill their obligations under the Railway Labor Act.

The conclusions reached by this Court in this opinion will be embodied in the final judgment to be entered after the trial of this action.

/s/ Alexander Holtzoff
United States District Judge.

March 3, 1966.

APPENDIX B

Opinion of the Court *

THE COURT: This action was brought by a large number of railroads against several organizations of railroad employees for the purpose of securing an adjudication as to reciprocal rights of the parties following the termination of the effective period of an award of a compulsory arbitration ordered by the Congress concerning two basic controversies between the employers and the employees, namely, the question whether firemen should be eliminated from diesel powered locomotives in freight and yard service, and whether the size of train crews or crew consist, as it is denominated in the parlance of the industry, may be reduced on various runs.

The award of the Special Arbitration Board created under the authority of Congress, is known as Award 282.

Two basic issues of law involved in this case were heard and determined separately in advance of the trial. The remaining issues involving largely the application of these prior rulings to specific situations, then came on for trial. This opinion disposes of the remaining questions of fact and law.

The evidence was introduced at the trial in the form of a detailed stipulation of facts consisting of about 22 pages with numerous exhibits attached thereto.

Counsel are to be highly commended for their admirable cooperation and meticulous and sedulous labors in preparing the stipulation and for proceeding in this highly effective and professional manner.

Although this action was brought originally for a permanent injunction as well as a declaratory judgment, counsel for the plaintiffs indicated, after the Court

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* Transcript of Proceedings, March 28, 1966, pages 116-127.

announced its earlier ruling on the two basic questions on March 3rd, 1966, that the plaintiffs would not press for an injunction at this time but desired a declaratory judgment. Accordingly, this action then proceeded and will be determined as an action for a declaratory judgment.

We shall now take up the various problems presented and argued at the trial.

The rulings about to be made must be considered in the light of the previous underlying basic opinion of March 3rd, 1966, which is to be deemed incorporated by reference.

During the effective period of Award 282, which terminated so far as the defendants in this action are concerned on January 25th, 1966, numerous reductions in train crews were authorized, either by agreements or by Special Boards of Adjustments created under Article III of Award 282. About 90 such awards of Special Boards of Adjustments are listed in the stipulation.

In its opinion of March 3rd, 1966, this Court ruled that a new status was created as a result of these awards and that this status is to be maintained after the expiration of the effective period of Award 282 and may be changed only by agreement or by first serving 30-day notices under Section 6 of the Railway Labor Act and then pursuing step by step the remedies provided by that statute.

During the same period as has just been stated, a number of agreements have been made relating to the composition and size of train crews embodying a provision that they shall continue in effect to the same extent as if they were awards of Special Boards of Adjustment created pursuant to Article III, or Section III as it is sometimes called, of Award 282.

Accordingly, it is the opinion of the Court that the same consequences attach to these agreements as to the awards of Special Boards of Adjustment. The agreements create a new status which may not be altered except by agreement or in the manner prescribed by the Railway Labor Act, as has just been stated.

This ruling obviously likewise applies to similar agreements which include a provision that they shall continue in effect until changed in accordance with the provisions of the Railway Labor Act. This conclusion likewise governs those agreements which provide that they shall continue in effect until January 25th, 1966 and thereafter.

Some of the agreements are silent on the question as to how long they should continue in force. The same consequences attach to them. In other words, they also create a new status that may not be modified after the expiration of Award 282 except by further agreement or by invoking the remedies provided by the Railway Labor Act, as already indicated.

There are numerous agreements referring to Award 282 which are expressly made dependent, in one way or another, in their duration, on the effective period of the basic award. Irrespective of the precise phraseology employed in each instance, they must be deemed to have been executed in the light of and in contemplation of Award 282 and as having the same effect as awards of Special Boards of Adjustment created under that award. It follows, hence, that the same consequences attach to them as to the agreements already discussed.

This conclusion also extends to agreements containing such provisions as that the agreement "shall remain in effect until January 25, 1966, as provided by Section IV, Duration of Arbitration Award No. 282;" or "shall remain in effect only for the duration of award of Arbitra-

tion Board 282;" or that "neither party shall serve notices under the provisions of Arbitration Award No. 282 for any change in crew consists prior to January 25th, 1966;" or "an agreement in accordance with the terms of the award of Arbitration Board 282;" or "that this agreement shall remain in effect until January 25th, 1966, with the understanding that neither party shall serve notices under the provisions of Arbitration Award No. 282 for any change in crew consists prior to January 25th, 1966;" or "that this agreement will continue in effect in accordance with Section IV, Duration of Award of Arbitration Board 282."

It is clear that all of these agreements were adjusted to the duration of the effective period of Award 282, they were made in contemplation of that Award, and the reasonable construction of these agreements, in the opinion of the Court, is that they have the same effect as awards of the Special Boards of Adjustment created under the Award, and the same consequences attach, namely, that a new status is created which cannot be changed except in the manner already discussed.

It will be recalled that in practically every case the original controversy had its inception in notices served by carriers and counter-notices served by organizations of employees. There are a few cases, however, in which notices were served only by organizations of employees. The Court is of the opinion, however, that they too come within the purview of Award 282 and therefore the present ruling applies to them.

In *Division 700, Brotherhood of Locomotive Engineers* v. *National Railway Labor Arbitration Board 282,* 224 F. Supp. 366, the Court held that a carrier was not affected by Award 282 if neither the carrier nor any of the organizations of employees served any notices under the Railway Labor Act in respect to employees of that

carrier. This Court in the course of its opinion made the following observation on page 366:

> "What is obviously meant by the statute"—referring to the statute creating Board 282—"is that the notices of November 2nd, 1959"—meaning the carriers' notices—"or the notices of September 7th, 1960"—meaning the employees' notices—"should have been outstanding throughout the period of mediation in order that the compulsory arbitration proceeding should attach to the specific parties."

It will be observed that the Court remarked that in order that the award might be applicable it was necessary that either one of the two groups of notices should have been outstanding and not that both groups were required. To be sure, this observation is a dictum, but it expresses the view of this Court, and the Court now rules, that Award 282 applies in the case of any carrier as to which either one of the two sets of notices were outstanding.

The Southern Railway System is in a peculiar position. Its component parts were not parties to the proceedings before Arbitration Board 282 and as a result would not have been bound by its award. They entered into an agreement, however, with the Brotherhood of Railroad Trainmen on July 26th, 1965, reducing the size of various yard crews and crews on numerous branch lines. This agreement provided in Paragraph 5 that:

> "This agreement shall become effective July 26th, 1965 and shall contiue in effect until January 25th, 1966 and thereafter, to the same extent as if it were an award of a Special Board of Adjustment rendered in pursuance of Section III, consist of road and yard crews, of the Award of Arbitration Board No. 282."

The conclusion necessarily follows that the same consequences attach to this agreement as do to the agreements already discussed.

A different result must be reached in respect to three agreements which contain an express provision to the effect that upon their expiration the prior rule as to crew consist would again be in full force and effect. It is clear that in these instances the express intention of the parties was to preclude the creation of a new status, but to limit the reduction of size of crews to a specific period. In these cases the Court is of the opinion that the carriers are obligated to restore the crews to their pre-existing size. These crews may be reduced only by further agreement or by proceedings under the Railway Labor Act initiated by the service of notices under Section 6.

In some instances proceedings were pending but not completed before Special Boards of Adjustment when the effective period of Award 282 came to an end on January 25th, 1965. The question is presented whether these proceedings may continue subsequently to that date and final awards made later.

The problem is analogous to that which arises in the event of a repeal of a statute conferring jurisdiction on a court. Under such circumstances the court is not only deprived of authority to entertain future actions of the type covered by the jurisdictional act which has been repealed but also looses power to proceed in those cases covered by the act that were pending on the effective date of repeal. This principle was established in the historic case of *Ex Parte McCardle, 7 Wallace 506.* There are numerous other cases enunciating and applying the same principle. Among them are *Railroad Company* v. *Grant,* 98 U.S. 398; *Hallowell* v. *Commons,* 239 U.S. 506; *Bruner* v. *United States,* 343 U.S. 112. In *Railroad Company* v. *Grant,* Mr. Chief Justice Waite stated that:

> "It is well settled that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law."

Such a frustration is frequently prevented by the inclusion of an express saving or reservation clause in the legislation providing for repeal.

No such clause is found either in the Act providing for the creation of the Arbitration Board or in the Award of the Board. It is not unlikely that the Board was of the opinion that it was without power to include such a reservation or saving clause in its Award in view of the peremptory cutoff date contained in the statute.

The conclusion is inescapable that all proceedings pending before Special Boards of Adjustment came to an end on January 25th, 1966 and that no effective award could be made in any of them subsequently to that date.

The Court is not unmindful of the fact that underneath the prosaic questions of a somewhat technical nature, seemingly, upon which it has had to rule, there are human problems. The Court is not oblivious of the fact that there are many employees and their families who have suffered some hardship and possibly considerable hardship, if is to be hoped of a temporary nature. This unfortunate situation is part of a much larger picture. As a result of vast far-reaching technological improvements, inventions and discoveries coming along within a short period of time we have been going through a situation that is somewhat analogous and akin to the Industrial Revolution in England of 150 years ago, although not quite as intense in degree. The period of transition creates difficulties for individuals, without doubt.

Fortunately, we have developed a social consciousness that did not exist in England 150 years ago and many steps have been taken, effectively, to lighten the burden on individual employees and their families during the period of transition. For example, the government has

provided for unemployment compensation and other forms of social security. There are various agreements between labor unions and employers that tide employees over a critical period. Board 282 has made an outstanding and notable contribution in that field. Some hardships will remain, without a doubt. The Court is not unaware of that fact.

One of the problems is the fact that there are many employees who are unwilling to learn new skills or change occupations or are reluctant to change their homes. The old pioneer spirit seems to have been dampened. The quest for adventure that was exhibited by men and women who crossed the prairies in covered wagons seems to have been diminished to a large degree. The spirit of the immigrant who looked around and was willing to take any job to make a living does not seem to exist to the same extent.

However, we must realize that we are dealing with human beings that have all the frailities, as well as all the good characteristics, of humanity; we are not dealing with automatons.

The Court had all this in mind and it realizes that some of these rulings will necessarily cause some hardship. The Court is gratified, however, to be cognizant of the fact that the award of Board 282 has eliminated or reduced a great many hardships that otherwise might have followed.

The Court does not want to conclude this opinion without expressing a sense of gratification at the fact that although the representatives of the carriers and the representatives of the employees fought energetically and valiantly for the rights of the parties whom they represent, as it was their duty, they nevertheless did so

in a manner that was in due accord with the respect for the law and ethics and morals.

The stipulation of facts entered into by the parties, the opinion of this Court filed on March 3rd, 1966, and a transcript of the present decision, will together constitute the findings of fact and conclusions of law. Counsel may submit a judgment embodying the rulings made in these two opinions.

APPENDIX C

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Opinion of the Court*

THE COURT: In this action a preliminary determination has been had as to some of the basic questions of law in an opinion rendered by this Court on March 3rd. Then the issues as to all of the defendants except one were tried and determined by a subsequent opinion rendered by this Court on March 28th. The issues as to the defendant Order of Railway Conductors and Trainmen were severed by the Court on the application of the parties for separate disposition and they are before the Court at this time.

The parties have in a very commendable manner stipulated all the facts; and the Court adopts the stipulation of facts as its findings of fact and this opinion will constitute the conclusions of law.

There are two issues to be determined between the parties.

During the effective period of Award 282 the defendant served certain notices under Section 6 of the Railway Labor Act, 45 U. S. Code 156, proposing changes in what is called crew consist in the parlance of the railway industry or the size of train crews. The Court held in its opinion of March 28th that while these notices were not nullities, they were prematurely served and did not become effective until the day after the termination of the effective period of Award 282.

Immediately upon their becoming effective, it was the duty of both parties to proceed to conduct conferences, as provided in Section 6 of the Railway Labor Act, with the view to negotiating the dispute.

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* Transcript of Proceedings, April 19, 1966, pages 46-53.

It appears in this case that conferences have been had prior to the termination of the effective period of the Award between the parties. These conferences, however, consisted of a statement on the part of the carriers to the effect that the notices were prematurely served and were otherwise outside of the scope of the Act and therefore there was no obligation to negotiate. To be sure, at these conferences representatives of the employees attempted to discuss the merits of the dispute. Into this discussion, however, the representatives of the carriers declined to enter.

The Court is of the opinion that this is not a conference of the type required by the Railway Labor Act. Conferences required by the Act must involve negotiations concerning the merits of the dispute. There was no obligation to negotiate until after the termination of the effective period of the Award.

Under the Railway Labor Act, as it has been construed by the Supreme Court in *Virginian Railway* v. *Federation of Railway Employees,* 300 U.S. 515, it was held in a unanimous opinion rendered by Mr. Justice Stone, to which this Court adverted at length in its opinion of March 3rd, that there is a binding obligation on the part of both parties to conduct negotiations in good faith pursuant to notices served under Section 6 of the Railway Labor Act. The Supreme Court made it clear that the provision for negotiations was not merely an expression of a pious wish, was not hortatory, but was a command. At page 545 the Court stated:

> "It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer and that its command in a proper case be enforced by the courts."

In that case it was the carrier who refused to negotiate, but the obligation is equally binding on both sides.

At page 548 Mr. Justice Stone states:

> "The statute does not undertake to compel agreement between the employer and employees, but it does command those preliminary steps without which no agreement can be reached. It at least requires the employer to meet and confer with the authorized representative of its employees, to listen to their complaints, to make reasonable effort to compose differences. In short, to enter into a negotiation for the settlement of labor disputes."

Reciprocally, I would say that there is an obligation on the part of the representatives of employees to meet and confer with authorized representatives of the employers and to make reasonable efforts to compose differences.

That requirement is not fulfilled by a meeting at which one side denies the obligation to negotiate. There must be a bona fide actual negotiation, and the courts will, by appropriate decrees, require negotiations.

Accordingly, the Court rules that it is the duty of both sides, through their representatives, to meet, confer and negotiate for the purpose of endeavoring to reach an agreement, if possible, and that such negotiations are the first step to be taken under the procedure prescribed by the Railway Labor Act.

The Court further holds that the meetings held at which one side declined to negotiate the merits of the dispute because it was under no obligation to do so, is not sufficient compliance with the Act.

This discussion disposes of the first issue to be determined at this hearing.

The second and final issue is whether either party may, prior to the termination of the negotiations, apply to the National Mediation Board for their services. That question too is governed by Section 6 of the Railway

Labor Act. It provides, in effect, that after the service of notices under Section 6 conferences are to be held between the parties and also that application may be made to the National Mediation Board for its services.

Section 155 of Title 45, being Section 5 of the Railway Labor Act, provides that either employees or a carrier may invoke the services of the Mediation Board in connection with a dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference. In other words, it is contemplated that conferences should take place first and an attempt should be made to reach an adjustment.

Whether conferences must be exhausted or whether in the course of the conferences application may be made to the Mediation Board is a matter concerning which the statute seems to be silent. It seems to the Court that it is the National Mediation Board that must first exercise its discretion in determining at what point in the negotiations it will accept an offer or comply with a request for its services. Whether it should wait until all of the negotiations are exhausted or whether it should step in during the progress of the negotiations if requested, it seems to the Court is a matter for the discretion of the National Mediation Board.

The Court has in mind the general basic principle that the judiciary will not interfere with proceedings pending in administrative agencies until after the proceeding has terminated. In this connection the Court refers to its decisions in *Southern Pacific Co.* v. *National Mediation Board,* 223 F. Supp. 951, and *International Brotherhood of Teamsters etc.* v. *Brotherhood of Railway Steamship Clerks,* 245 F. Supp. 835, which was affirmed by the Court of Appeals on March 22nd of this year.

In other words, the Court reaches the conclusion that it is not for this Court to determine at what point the

National Mediation Board may step into the dispute, whether during the progress of the negotiations or only after the negotiations are completed. That is a matter for the National Mediation Board.

The Court does reach the conclusion, however, that recourse to the National Mediation Board may be had only after notices under Section 6 become effective, which in this case was the day after the termination of the effective period of the Award.

In conclusion the Court wants to state emphatically that under the Railway Labor Act there may be no recourse to self-help until each of the procedural steps provided by the statute are exhausted successively, and the conferences and mediation are only the first two steps, there are others prescribed.

Counsel may submit a proposed judgment embodying these two rulings.

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APPENDIX D

Opinion of the Court *

THE COURT: The present motion is, in effect, an application at the foot of the decree. In the opinion of the Court the relief which the Court will grant is a proper relief to be granted at the foot of the decree, even though the motion itself possibly, as originally framed, seeks relief beyond such a scope.

The relief requested is in the form of a declaratory adjudication or judgment. The Court is of the opinion that there is a justiciable controversy justifying such relief.

The basic question presented to the Court is whether conferences should be held pursuant to Section 6 of the Railway Labor Act on the basis of notices served by the carriers, who are making the present motion, on the defendant brotherhood, and by the latter on the carriers. Some conferences have indeed taken place. The conferences have been abortive. Each side blames the other for the fact that the conferences were frustrated.

The Court is of the opinion that no useful purpose would be served by determining whose fault it was that in any particular instance a bona fide conference on the merits of the dispute has not taken place.

The fact remains that the Railway Labor Act, by Section 6 thereof, 45 United States Code 156, contemplates that there should be a full-fledged conference on the merits of the dispute after the service of notices.

The Court has previously held that although the notices served prior to the expiration date of the Award were not nullities, they did not actually become effective until after the expiration of the Award and no steps had to be taken thereunder.

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* Transcript of Proceedings, May 19, 1967, pages 71-74.

There is a public interest involved here and irrespective of who is to blame for the abortive character of the attempts to hold conferences, the Court holds that conferences must be held at this time. It bases its decision on the ruling of the Supreme Court in *Virginian Railway Co.* v. *System Federation No. 40*, 300 U.S. 515, in which the Supreme Court held that although the courts cannot compel parties to agree, they may and will compel them to negotiate under Section 6 of the Railway Labor Act. Naturally, such a negotiation must be a full-fledged negotiation on the merits of the dispute.

There is another branch of this motion and that is an adjudication as to the rights or duties of the brotherhood in respect to the National Mediation Board. The Court is of the opinion that it should not interfere, either directly or indirectly, with the National Mediation Board, *Switchmens Union of North America* v. *National Mediation Board*, 320 U.S. 297; *Southern Pacific Co.* v. *National Mediation Board*, 223 F. Supp. 951; *International Brotherhood of Teamsters* v. *Brotherhood of Railway & Steamship Clerks*, 245 F. Supp. 835, which was affirmed by the Court of Appeals on March 22nd, 1966.

However, it cannot be said that the remedies under the Railway Labor Act will have been exhausted until and unless conferences are held under the notices, and the Court reaches the conclusion that the attempts to hold such conferences so far have not complied with the spirit or the letter of the Railway Labor Act.

The Court further holds that there can be no resort to self-help on either side until every step—first, conferences, and then the other steps prescribed by the Railway Labor Act—are concluded. In other words, the carriers may not put their notices in effect unilaterally and the employees may not resort to a strike.

So far as mediation proceedings are concerned, the Court will not interfere with the National Mediation Board. It may well be that the National Mediation Board, in the exercise of its discretion, will postpone further steps until after conferences have been held as indicated in this opinion, but the Court will not interfere by any order or adjudication with the activities of the National Mediation Board, directly or indirectly.

You may submit an appropriate order in conformity with this decision.

APPENDIX E

* * * *

Appeals from the United States District Court
for the District of Columbia

Decided May 12, 1967

Mr. Milton Kramer was on the brief for appellants in Nos. 20,152, 20,229 and 20,249 and appellees in No. 20,172.

Mr. James D. Hill for appellant in No. 20,158 and appellee in No. 20,191.

Mr. Joseph L. Rauh, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss*, were on the brief for appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief for appellants in Nos. 20,172, 20,191, 20,215 and 20,216 and appellees in Nos. 20,152, 20,158, 20,192, 20,193, 20,229 and 20,249. *Messrs. David Booth Beers* and *Ralph J. Moore, Jr.*, also entered appearances for appellants in Nos. 20,215 and 20,216.

Before DANAHER, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge*.

LEVENTHAL, *Circuit Judge*:* This opinion deals with a number of appeals and cross-appeals in the railroad work rules litigation.

It may help if at the outset we indicate generally the nature of our views, though their precise exposition and the complexity of the issues require a long opinion. Part I of this opinion reviews the history of the passage by

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* As amended by Order of July 18, 1967.

Congress in 1963 of a law providing for compulsory arbitration of the work rules controversy with an Award of two years duration. In Part II we approve the conclusion of the District Court that the work rules in effect following the expiration of the Award in 1966 did not revert to the 1963 condition and that the new plateau of work rules, established for early 1966 by the Award, continued in effect unless changed in accordance with the Railway Labor Act. In Part III, reversing a ruling of the District Court, we hold that even prior to the expiration of the Award the carriers had a statutory duty to respond to notices of the unions and begin collective bargaining about the rules to become effective following the expiration of the Award. In Part IV we conclude, reversing the District Court, that the railroad companies violated their duty to bargain with the Firemen, on the notice relating to prospective work rules, and with the Trainmen. We affirm other aspects of the decree, albeit for reasons somewhat different from those of the District Court, since we conclude that the railroads had no statutory duty to bargain over either another notice served by the Firemen, which sought to undermine rights vested under the Award, or the early notice served by the Conductors.

I

Understanding of the issues will be aided by a historical review of the problem.

The phenomenal growth of railroads in the 19th century was accompanied by evolution of complementary employee organizations. Railroad workers were among the first to organize unions to present employee demands collectively. The Order of Railway Conductors was founded in 1868, the Brotherhood of Railroad Firemen and Enginemen in 1873, and the Brotherhood of Railroad Trainmen in 1883. Labor relations in the railroad sphere

has been the subject of Congressional enactments, and is now governed essentially by the Railway Labor Act.[1]

The last hundred years have also witnessed the evolution of an elaborate "common law" embracing the relations of railroad management and labor. There exists a roughly defined system that is the product of long-established practices and understandings, collective bargaining agreements, court decisions and administrative orders. The system covers among other things the manning of trains and the assignment of tasks to employees. These principles and patterns of behavior are collectively denominated "work rules."[2] As the Supreme Court has aptly put it, the railroad industry with its complex of regulations is virtually a "state within a state."[3]

Work rules concerning firemen date from the early days of the industry. Their initial chore was to select and load fuel into the wood-burning locomotive. The appearance in the late 1920's of the diesel engine spawned the problems that beset the industry to this day. The carriers consistently contended that the former loaders of wood were now merely dead wood. Yet beginning in 1933 the Brotherhood of Locomotive Firemen and Enginemen (hereafter BLFE) negotiated individual agreements with various carriers to preserve the continued status of firemen-helpers. The BLFE in 1937 joined with substantially all United States carriers in signing the National Diesel Agreement, providing for the employment of fire-

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[1] 45 U.S.C. §§ 151-63 (1964), as amended, 45 U.S.C. § 153 (Supp. II, 1966).

[2] *See generally* Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration,* 14 De Paul L. Rev. 115 (1964).

[3] *See* Whitehouse v. Illinois Cent. R.R., 349 U.S. 366, 371 (1955), quoted by Fortas, J., dissenting in Transportation-Communication Employees Union v. Union Pac. R.R., 385 U.S. 157, 176 n.5 (1966).

men-helpers on practically all diesel powered locomotives. Similar terms endured in subsequent contracts, including the Diesel Agreement of 1950.

While work rules retaining positions for firemen became thus established, the industry's quest for modernization resulted in almost one hundred percent diesel operation. In 1956 the carriers gave hint that intense competition from other modes of transport and the resulting financial pressure would no longer permit preservation of the ancient status. During negotiations on their proposal to give management the discretion to determine the employment of firemen the carriers withdrew this plan by agreeing to a three-year moratorium on such changes in work rules. But the die had been cast, and the carriers argued that the verdict of history and technology had come in, pronouncing railroad firemen extraneous members of a train crew. So too, they asserted, advanced technology and innovations would permit sharp reductions in the level of what is called the "crew consist," specifically the number of brakemen needed for the safe operation of the train.

It is against the backdrop of the always "sensitive and touchy problem"[4] of overmanning and efforts to overcome it that we focus on the events more immediately leading up to these appeals. In 1959 the carriers served notices under Section 6 of the Railway Labor Act,[5] pro-

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[4] Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., 382 U.S. 423, 430 (1966).

[5] 45 U.S.C. § 156 (1964): Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have

posing the elimination of firemen from freight and yard service, and the abrogation of regulations fixing the size of train crews. The following year, 1960, the unions served a series of counter-proposals directed at continuing and even extending the use of firemen and at setting the crew consist level at not less than one conductor and two brakemen plus such additional trainmen as the assurance of maximum safety demanded.

Shortly thereafter, in an effort to aid in the adjustment of this dispute, President Eisenhower appointed a special Presidential Railroad Commission to study the various facets of the problem. This Commission issued its report and recommendations in 1962. In general the carriers accepted the findings, but the unions balked.

Meanwhile, the lengthy procedures contemplated and mandated by the Railway Labor Act continued. Negotiations and mediation failed to bridge the gulf between the parties. The atmosphere of crisis heightened, for the Supreme Court ruled in March of 1963 that all the tools of the Act prescribed for the parties had been tried and found inadequate, and they were thus free to resort to self-help: that is, the unions could lawfully strike, or the carriers could unilaterally impose the new rules.[6]

The last device in the statutory arsenal was invoked. Acting under Section 10 of the Railway Labor Act, 45 U.S.C. § 160, the President, on a finding by the National Mediation Board of the threat of deprivation of

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been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

[6] Brotherhood of Locomotive Engineers v. Baltimore & O.R.R., 372 U.S. 284, 290-91 (1963).

essential transportation services, convened an Emergency Board to make a prompt investigation and report. For thirty days following the rendition of such a report no party may take unilateral action. The investigation was made and the report was filed.

Once again the unions proved unwilling to accede to the recommendations of others. During July of 1963 a flurry of tense negotiations was spurred by the active intervention of President Kennedy and the participation of Secretary of Labor Wirtz. The unions rejected the President's proffer of the services of Justice Arthur Goldberg as arbitrator of the dispute. For a fleeting period it appeared that voluntary arbitration would provide the answer, but though the parties indicated willingness in principle they could not get together in the procedural particulars of arbitration.

A strike was imminent. The country was faced with a serious emergency. No outstanding techniques remained to move the antagonists to a responsible accord. Only Congress could avert a national catastrophe, and it was to Congress that President Kennedy turned for unprecedented measures.[7] The Administration proposal, submitted July 22, 1963,[8] would have authorized the Interstate Commerce Commission to serve, in effect, as the agency for compulsory settlement of the threat by empowering it to put into effect, on the application of the parties, any of the changes proposed in the notices of 1959 and 1960 with such modification as it found appropriate in reconciling the private and public interest. That resolution made it clear that these were to be only interim work rules to be effective until the parties themselves

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[7] *See Message from the President of the United States Relative to Railroad-Labor Dispute,* H.R. Doc. No. 142, 88th Cong., 1st Sess. (1963).

[8] S. J. Res. 102, 88th Cong., 1st Sess. (1963).

agreed on more permanent terms, but in no event to last for more than two years.

The law that was actually passed differed in various particulars from the Administration measure. The "one significant change"[9] made was the substitution of an independent *ad hoc* board of arbitration for the Interstate Commerce Commission, principally for the reason that Congress wanted to emphasize the peculiar and non-precedential nature of its emergency intervention. By August 28, 1963, this unique compulsory arbitration law, Public Law 88-108, had passed both Houses of Congress and received presidential approval. We set out this statute in an appendix to this opinion.

Public Law 88-108 expressly forbade any unilateral self-help by the parties who had served or received the notices of 1959 and 1960. It created a Board of Arbitration (since designated Board 282), to be composed of seven members, two each representing the carriers and unions, and the other three to be selected by the President if, as happened, the parties could not agree even on mutually acceptable neutral members. The Board was ordered to pass on the two focal issues of the use of firemen and the size and composition of train crews. The Award (since designated Award 282) was to "be binding on both the carrier and organization parties to the dispute and . . . constitute a complete and final disposition of the aforesaid issues. . . ." (Section 3). The effective date of the Award was set at sixty days after filing in the United States District Court for the District of Columbia. According to Section 4 the Award was to "continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree other-

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[9] Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

wise."[10] It is this provision specifying the maximum mandatory duration that has sparked the issues we are now required to judge.

The Board met, held hearings, took evidence. It issued an Award that provided: "This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise." An important extension agreement is that of the carriers and BLFE, which extended the termination date to March 30, 1966. Except for such agreement the Award expired at the close of the two year period on January 24, 1966.[11]

Award 282 held that the nearly two hundred carriers involved could eliminate ninety percent of the firemen positions, and set forth a procedure for dismissal and attrition. It was a staggering blow to the BLFE. The

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[10] The measure was somewhat analogous to the legislative intervention in a 1916 rail dispute when Congress decreed that eight hours was to be the measure for a standard day in determining compensation, and forbade reduction in the standard day's wage until thirty days after findings were announced by a special commission created to study this system, to report back in six-to-nine months. The Supreme Court upheld this statute, characterizing it as a form of compulsory arbitration that was "limited" to a "reasonable period" fixed by the statute. *See* Wilson v. New, 243 U.S. 332, 345, 346, 351 (1917); *Message from the President, supra* note 7, at 4-5; S. Rep. No. 459, 88th Cong., 1st Sess. 8 (1963).

[11] The parties and the District Court have all accepted and implemented the Award as effective January 25, 1964. With that date marking the first day of the two-year period it is clear that the full two-year period expired at the end of January 24, 1966. We see no valid basis for the assumption of the District Judge that the Award was in existence on January 25, 1966. It may be regrettable, but we consider the Award rendered on January 25, 1966, by a special board of adjustment with respect to a dispute between BRT and the Green Bay & Western Railroad Co. and Kewanee, Green Bay & Western Railroad Co. to be without legal significance, unless it has been adopted by agreement of the parties, a question not before us.

Award did not, however, authorize a single spasmodic discharge of thousands of firemen. Indeed, in some aspects it was "highly favorable to the employees," *see In re Certain Carriers, Etc.*, 229 F. Supp. 259, 261 (D.D.C. 1964). Thus the Award guaranteed permanent employment for life, or until retirement or resignation, for every fireman who had been in active service for more than ten years, with a comparable job insured for all with service of two years or more. Those firemen with less than two years seniority were accorded severance allowances, amounting in some cases to six months pay. Under the terms of this Award the carriers have pruned eighteen thousand firemen from their ranks, paid out some $36,000,000 in separation benefits, and provided comparable jobs to twelve hundred former firemen.

On the crew consist issue, the Board determined that a single national standard would be inappropriate. It ruled that no change in crew consist be made except pursuant to the Award. Then it provided that where existing work rules required more or less than two trainmen, any party might give notice of a proposed change. If after conferences were held by the local properties no agreement was forthcoming, the issue could be referred to a special board of adjustment created at the local level. The Award articulated a series of "guidelines" to be followed by these special boards in resolving particular disputes. Many crew consist agreements and special awards were made under this procedure.

Pursuant to Section 9 of the Railway Labor Act, 45 U.S.C. § 159 (1964), as incorporated by reference in Section 4 of Public Law 88-108, the unions sued in the District Court for the District of Columbia to impeach the Award. The attack was two-pronged. First, they contended that the statute authorizing compulsory arbitration in this context was unconstitutional as beyond the power of Congress, or in the alternative as delegating power

to an administrative body without adequate specificity of standards. Second, the unions argued that the Award did not conform to the statute under which it claimed vitality. The District Court rejected both challenges, and both approved the statute and confirmed the Award. *Brotherhood of Locomotive Firemen* v. *Chicago, B. & Q. R.R.*, 225 F.Supp. 11 (D.D.C. 1964). This court affirmed,[12] 118 U.S.App.D.C. 100, 331 F.2d 1020, and the Supreme Court denied certiorari, 377 U.S. 918 (1964).

In subsequent months there poured into the courts, here and elsewhere, a number of actions, some brought by unions and some by railroads, presenting a plethora of particular problems,[13] but these skirmishes need not detain us. What is critical to the situation now before us is this. Instead of using the two-year period specified by Congress and the Award to continue meaningful negotiations looking toward long range adjustments of the various vexing problems, guided by the experience gleaned from functioning under the Award's interim rules, the parties apparently focused on whether the expiration of the Award would leave them in a better position than they might achieve by return to the collective bargaining table, where some concessions might have to be made.

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[12] One judge dissented on the ground that the constitutional issues should have been referred to a three-judge district court.

[13] These actions were largely concerned with the proper construction of the statute or award in regard to individual fact situations. *See, e.g.*, Brotherhood of Railroad Trainmen v. Certain Carriers, Etc., 121 U.S.App.D.C. 230, 349 F.2d 207 (1965); Brotherhood of Railroad Trainmen v. Chicago, M., St. P. & Pac. R.R., 120 U.S.App.D.C. 295, 345 F.2d 985 (1965); Atchison, T. & S.F.Ry. v. Brotherhood of Railroad Trainmen, 324 F.2d 899 (7th Cir. 1963); In re Certain Carriers, Etc., 231 F.Supp. 519 (D.D.C. 1964); Brotherhood of Railroad Trainmen v. Missouri Pac.R.R., 230 F.Supp. 197 (E.D.Mo. 1964); In re Certain Carriers, Etc., 229 F.Supp. 259 (D.D.C. 1964).

The positions adopted by the parties, distilled to their essentials, were as follows: The Unions believed that upon expiration of Award 282, authorized by Congress as a "final" settlement for a period "not to exceed two years," it would have no continuing significance. They assumed that immediately upon the expiration of the Award the status quo ante would revive and the National Diesel Agreements would once more control. This position was shared by the other unions who presumed the prior crew consist rules would return from a two year consignment to limbo. But as a hedge the unions also, during the effective period of the Award, served notices proposing in substance that on termination of the Award there would come into effect rules that were substantially similar to the old work rules, with relatively minor adjustments.

Not surprisingly, the carriers took a different view. As they saw it, the status created by Award 282 had an enduring quality that transcended the formal effective period of that Award. But they too, "just in case," served counter-proposals on the unions to preserve the benefits the Award had carved for them. As will appear in greater detail, the carriers declined to discuss the merits of any of these notices at the few conferences that were held prior to the termination of the Award, reasoning that although Public Law 88-108 and the Award permitted bargaining during that period they nevertheless stopped short of imposing a legal duty to do so. These are the two central questions of these appeals: What rules were in force the day after Award 282 expired? What was the duty of the parties to bargain about changing those rules, and when did it arise?

These appeals reach us from the orders disposing of suits and counter-suits seeking declaratory and injunctive relief, brought by the carriers and by the Brotherhood of Locomotive Firemen and Enginemen (BLFE), the Broth-

erhood of Railroad Trainmen (BRT), and Switchmen's Union of North American (SUNA), and the Order of Railway Conductors and Brakemen (ORCB). *See generally Bangor & A.R.R.* v. *Brotherhood of Locomotive Firemen,* 253 F.Supp. 682 (D.D.C. 1966) (Nos. 20192, 20193, 20215, and 20216); *Akron & B. Belt R.R.* v. *Brotherhood of Railroad Trainmen,* 250 F.Supp. 691, 252 F.Supp. 207 (D.D.C. 1966) (Nos. 20152, 20172), *supplemented,* 254 F. Supp. 306 (D.D.C. 1966) (Nos. 20229, and 20249); *Akron & B. Belt R.R.* v. *Order of Railway Conductors,* 253 F. Supp. 538 (D.D.C. 1966) (Nos. 20158 and 20191).[14]

II

In advance of the trial of these cases, the parties consented to the preliminary adjudication of the effect of the expiration of Award 282. In a guideline opinion underlying subsequent rulings, the District Court held that, even though the Award formally terminated, it had created a "new plateau" of work rules, which were to continue in force until changed pursuant to the regular procedures of the Railway Labor Act.[15] See *Akron & B. Belt R.R.* v. *Brotherhood of Railroad Trainmen,* 250 F. Supp. 691, 695-97 (D.D.C. 1966).

The BLFE argues that the intention of Congress in giving the Award a limited 2-year life was to deny it any further legal effect, to leave the parties as if the award had never been in existence, and to restore the

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[14] Appeal No. 20316, Brotherhood of Locomotive Firemen (and H. E. Gilbert) v. Bangor & A.R.R., arises from an adjudication of contempt for violating a temporary restraining order. Although it was argued together with these cases, it presents different questions and is being considered separately. *See* Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, 255 F.Supp. 476 (D.D.C. 1966).

[15] *Compare* Manning v. American Airlines, Inc., 329 F.2d 32, 34 (2d Cir.), *cert. denied,* 379 U.S. 817 (1964). *See also* Manning v. American Airlines, Inc., 221 F.Supp. 301 (S.D. N.Y. 1963).

status quo ante with the result that the day after the Award expired the work rules in effect were the same as those in effect when the statutes was passed. This approach has a kind of formal logic, and certain provisions of Public Law 88-108 could be read this way. Our approach in ascertaining "legislative intent" is hampered by the fact that the possibility that by the end of the formal duration of the Award the parties might not have agreed on anything to take its place is a subject on which the legislative history is, to use Justice Harlan's phrase, "essentially negative, which shows with fair conclusiveness only that Congress was not squarely faced with the problem this case presents."[16] In our case there is the added consideration that Congress was undoubtedly aware of the problem but apparently thought wisdom lay in avoidance of express delineation.

We think the mere limitation of the effective period of the Award neither implies nor compels the construction the unions seek. Our ruling is that the work rules created by the Award constituted a new plateau that was not automatically eroded when the Award expired. The legal underpinning for our ruling is not the Joint Resolution, which expired after 180 days of life—except insofar as necessary to sanction the Award. The ruling is not based on the Award, which had only a 2-year life, or on any agreement of the parties. The predicate of our ruling is, simply, the force of the Railway Labor Act. Certain work rules were in force on January 24, 1966 (or March 30, 1966, in the case of the BLFE). The mandate of the Railway Labor Act requires that the work rules in effect on any particular day shall also be in effect the following day—beyond the power of either party to institute a unilateral modification—subject to change only in accordance with the procedures prescribed by the Act. These pro-

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[16] *National Woodwork Mfrs. Ass'n* v. *NLRB*, —— U.S. ——, ——, 35 U.S.L.W. 4349, 4360 (U.S. April 17, 1967).

cedures begin with the notices required by Section 6 to be served by any party seeking a change at least thirty days in advance of the proposed effective date of such change. This new-plateau reasoning applies even though the work rules are established by agreements of limited duration. "The effect of § 6 is to prolong agreements subject to its provisions regardless of what they say as to termination."[17] It likewise applies even though the work rules are established by an arbitration award of limited duration.

This by no means suggests that there is no legal significance in establishing an award or agreement as one of limited duration. The limited duration has the obvious significance that work rules can be changed for the post-expiration period. The work rules can be changed, however, only by compliance with the provisions of the Railway Labor Act prescribing how changes in work rules are to be effectuated.

What we are in effect holding is that since Public Law 88-108 is silent as to the applicable legal rule, the case is governed by the combination of undeniable physical facts plus the general legal rule of the Railway Labor Act. The BLFE is constrained to find superseding intention in Public Law 88-108 which would in effect obliterate not only the Award as a document with legal effect but also the physical facts that came into being during the 2-year period. We think its construction of Public Law 88-108 would be unreasonable and inconsistent with the purposes and context of the legislation. It must have been reasonably contemplated that the Board of Arbitration might order deflation of the scope of existing overmanning. And it seems obvious that an automatic rescinding of any such pruning at the instant the Award was to terminate would spark the most unsettling havoc. To

[17] Manning v. American Airlines, Inc., *supra* note 15, 329 F.2d at 34.

reach this result would necessarily mean trying to recreate a practically unrecoverable situation and sweeping away a host of rights that had already vested concomitant with the award, made final under the Act, permitting reductions in the work force. Such a view would also wipe out the supposedly permanent guaranty of employment for those thousands of employees whose seniority, the Award decreed, entitled them to lifetime protections.

III

We turn now to the question to what extent and by what procedure the parties could and did lawfully invoke the machinery prescribed by the Railway Labor Act in order to change the work rules in effect on the railroads at the expiration of the Award, rules that had been prescribed by the Board (including the crew consist rules prescribed by various local boards).

As already stated, these work rules were not immutable. Congress had enacted a compulsory arbitration measure of limited duration. The appropriateness of a limited duration for a compulsory arbitration measure, articulated by the Supreme Court 50 years ago in *Wilson* v. *New,* had been emphasized by the President and Congress.[18]

When were the parties to bargain about possible changes in the work rules that survived the Award? All parties agree that negotiation during the pendency of Award 282 was permissible, but the carriers say it was not obligatory. In our opinion, however, bargaining during the pendency of the Award 282 was not merely a matter for the whim of the parties but was to be governed by provisions of the Railway Labor Act, and these provisions remained in effect during the life of the Award for purposes of regulating the responsibilities of the parties to

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[18] *See* note 10 *supra.*

bargain concerning changes proposed to become effective *after* the expiration of the Award.

The principles and objectives underlying Public Law 88-108 reveal that Congress placed a high premium on the opportunity for continued collective bargaining during the life of the Award, in the hope and expectation, apparently shared at that time by the parties themselves, that the unions and carriers would themselves work out a long range solution to these sensitive problems by the traditional devices of collective bargaining. This special statute served to give the Nation a temporary respite from the threat of a disastrous national rail strike by forbidding for two years any unilateral changes or resort to self-help and imposing instead interim rules to cover the situation. But as we have seen, both the statute and the Award expressly contemplated that the parties were free to alter or extend the rules fixed by Award.[19]

Public Law 88-108 established a procedure for formulating rules to govern for up to two years, in the absence of a negotiated pact. This did not displace the otherwise applicable provisions of the Railway Labor Act on the duty to bargain on changes proposed to become effective subsequent to the two-year period. President Kennedy in his message to Congress expressed the desire that the parties continue to confer on the ultimate resolution of their disputes.[20] A chief spokesman for the carriers, Mr. J. E. Wolfe,[21] assured the Senate Committee that the car-

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[19] Indeed, on the crew consist issue, Section III.A(1) of the Award, remanded the dispute to local properties "for negotiation", and only if these further efforts to reach a settlement proved pointless were special boards of adjustment to be convened to fix the temporary rules.

[20] *See Message from the President, supra* note 7, at 6-8.

[21] Chairman of the National Railway Labor Conference, an organization whose members conduct about ninety percent of all railway operations in the United States.

riers understood that the Administration's bill "imposes a duty on the parties to attempt to settle their differences" and would "protect the public interest as a result of the establishment of these interim rules for a period of 2 years or less while the parties undertake, through collective bargaining, to bring about a more permanent solution of the problems." [22] We are aware that in the reshaping of the measure the duty to bargain on the work rules was not expressly spelled out, but the plan was surely retained. Indeed the preambles of both measures expressly and unequivocally proclaimed the care taken to select a system which solved the immediate emergency "in a manner which preserves and prefers solutions reached through collective bargaining." Changes were made by the Congress—notably the substitution of an independent *ad hoc* board for the Interstate Commerce Commission as the arbiter for the dispute.[23] There was not a breath of a suggestion, however, that Congress intended to remove or even downgrade the policy that the parties themselves should confer in order to reach long-range solutions through collective bargaining and agreement.

The carriers contend that all this means only that the parties were free to bargain during the Award if they wished, or even that they were encouraged to do so, but that for the two-year period the special act repealed pro tanto and by implication the duty under the Railway Labor Act to confer on proposed rule changes. We disagree. In our view Public Law 88-108 was intended to work the minimum disruption of permanent railroad legislation and normal collective bargaining. The only disruption wrought, the only "repeal by implication", was that

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[22] *Hearings on S.J.Res. 102, Before the Senate Comm. on Commerce*, 88th Cong., 1st Sess:, ser. 24, at 375 (1963).

[23] The Supreme Court referred to this substitution as the only "significant change" from the Administration bill. Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 432.

which necessarily accompanied the objective of staving off a cataclysmic strike by imposing a temporary settlement. We detect no glimmer of an intimation that the carriers were authorized to regard this as a two year hiatus in their obligation to bargain. Rather, we find much to militate against such a construction.

It is notable that the parties to this dispute had already agreed to submit their controversy to arbitration. They stumbled over procedural details. Congress viewed its role primarily as draftsmen of the specifics of an arbitration agreement to which the carriers and unions had already agreed in principle.[24] The statute in Section 4, the Award in Part IV, and the reports of both congressional committees carefully specified that the effective duration of the Award was limited to no more than two years, unless extended by stipulation, in order to restrict the "scope and impact" of the statute.[25]

In essence then we have a mechanism tantamount to an arbitration agreement, albeit one drafted by Congress, that confers on the arbitrator the power to impose a settlement binding for up to two years. It becomes appropriate, then, to consider what would have been the rights and duties of the parties if they had themselves written the arbitration agreement. We are not concerned here with customary adjudicatory or grievance arbitration. Although so-called "legislative" arbitration agreements are relatively infrequent they are not unknown. Under such agreements, prospective rules and working condi-

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[24] *See* S. Rep. No. 459, 88th Cong., 1st Sess. 9 (1963); H.R. Rep. No. 713, 88th Cong., 1st Sess. 12-13 (1963); Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R.R., 225 F.Supp. 11, 18 (D.D.C.), *aff'd*, 118 U.S.App.D.C. 100, 331 F.2d 1020, *cert. denied*, 377 U.S. 918 (1964).

[25] S. Rep. No. 459, 88th Cong., 1st Sess. 10 (1963); *see* H.R. Rep. No. 713, 88th Cong., 1st Sess. 14-15 (1963).

tions, instead of being determined by agreement of the union and employer, as is customary, are determined by an arbitrator to whom the function is delegated.[26] Such a determination by arbitration is equivalent to a determination by agreement insofar as the rights and duties of the parties concerning future modification are concerned. An arbitration award does not operate to "prevent the [parties] from seeking through negotiations under the procedures provided for by the Railway Labor Act or otherwise a new agreement . . . covering the rules. . . ." [27]

Responsible conduct of the process of collective bargaining, for consideration of proposals to modify work rules established by an agreement or award of limited duration, embraces conference and consultation prior to the termination date. This is the way responsible businessmen deal with each other when they plan to continue a business relationship—for example, in negotiating on a contract or lease before its expiration date. This is the way responsible employers and unions implement the collective bargaining process, and respond to calls for change. And this is the way railroads and railroad unions must respond under the mandate of the Railway Labor Act.

The purpose of a Section 6 notice is "to fix a procedure for the commencement of conferences between representatives of the two parties if changes are to be made in the contract." [28] No rigid form for these notices is defined in the statute.[29] All that is specified is thirty days

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[26] *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 30-47 (rev. ed. 1960).

[27] Sheehy, Ch.J., in Brotherhood of Railroad Trainmen v. St. Louis Sw. Ry., 220 F.Supp. 319, 326 (E.D. Tex. 1963).

[28] McMullans v. Kansas, O. & G. Ry., 229 F.2d 50, 56 (10th Cir.), *cert. denied*, 351 U.S. 918 (1956).

[29] *See* Detroit & T.S.L.R.R. v. Brotherhood of Locomotive Firemen, 357 F.2d 152, 153 (6th Cir. 1966).

written notice of a proposed change. The Act requires that within ten days a time and place for conference be set, and that the first conference be held within the 30-day period.

To recapitulate, the Railway Labor Act not only requires railway employers and unions to confer and bargain on work rules established by agreements or awards having a fixed expiration date when one party wants to change the rules, but permits the statutory machinery to be invoked *prior* to expiration in order to seek an agreement on changes to become effective on or after expiration.

If an agreement (or award) contains a fixed expiration date, rather than the common indefinite or automatic self-renewal term, then the notice must indicate a proposed effective date for changes that is not only at least thirty days after the notice, but also a time after the outstanding agreement or award expires. Nothing in the Railway Labor Act, or the scheme of Public Law 88-108, forbids service of a notice more than thirty days before the suggested rules would or could be effective, and nothing relieves the recipient from the duty to commence bargaining at that earlier stage.

The carriers seek to buttress their claim of pro tanto repeal by implication by arguing that it can hardly be supposed that Congress intended to permit the unions to ready themselves to strike on January 25, 1966. The only forecast of that day we can find in the legislative history is the assumption that it would be preceded by an agreement of the parties. And that in turn, in our view, assumes that responsible collective bargaining would have been in train some time prior to the expiration date. If we turn from speculation about legislative intent to the realities of the Railway Labor Act, we are aware that the conferences triggered by Section 6 notices are typically the

beginning and not the end of the statutory procedures. If conferences proposed by a Section 6 notice are unavailing, either party can invoke the services of the National Mediation Board. While negotiations continue or the Board has jurisdiction, no self-help is permitted. The parties are free to submit their controversy to arbitration. If none of these techniques resolves the matter, the President may convene an emergency board to investigate the dispute and report back on the issues. Only when all these steps have been exhausted are the parties permitted to act unilaterally. "For the procedures of the Act are purposefully long and drawn out, based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute."[30]

We do not say that the time of service of notice is completely irrelevant to the duties of the parties. It may be that a notice served the day after the Award would betoken bad faith to the point of vitiating its validity. We shall have occasion to point out that certain union notices were defective for analogous reasons. But the mere fact that the union notices were served prior to January 25, 1966, did not relieve the carriers of their duty to confer and bargain prior to January 25, 1966. We are not considering a case where the railroads, while conceding that the unions had a right to begin bargaining prior to the expiration date, responded that the particular notice came too early, perhaps on the ground that it did not permit enough experience under the existing rules to spawn realistic and informed bargaining. In the case before us the carriers flatly refused to engage in any statutory bargaining whatever prior to the expiration date. Except in the case of objectionable union proposals discussed below, the carriers before us must be held to have breached their

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[30] Brotherhood of Railway Clerks v. Florida E.C. Ry., 384 U.S. 238, 246 (1966). See also Farmer, *Compulsory Arbitration—A Management Lawyer's View*, 51 VA. L. REV. 396, 401-02 (1965).

statutory duty under the Railway Labor Act to confer and bargain on the merits of proposed changes in work rules. The decree of the District Court embodies a contrary declaration, and to that extent it is reversed.

We now consider the effect of our reversal of the District Court's ruling that the notices were not effective to require negotiation until after termination of the Award. As we have seen, conferences are but the first step in the chain of Railway Labor Act procedures. Once they have been frustrated, one side to the dispute can move to the next tier of procedures, and indeed in at least one series of cases involving parties before us the National Mediation Board has accepted jurisdiction of the controversy. The carriers have foresaken their right to insist on conferences by their refusal to respect effective Section 6 notices. The standard for good faith bargaining is quite liberal. Certainly it does not compel agreement. Judge Bryan, after the most careful analysis, formulated the frequently quoted standard that the—

> requirement of good faith bargaining is really a requirement of absence of bad faith. In order to show such lack of good faith it is necessary to establish facts from which it can be reasonably inferred that a party enters upon a course of bargaining and pursues it with the desire or intent not to enter into an agreement at all. *American Airlines, Inc.* v. *Air Line Pilots Ass'n*, 169 F.Supp. 777, 794 (S.D.N.Y. 1958).

Applying such a test, the carriers have breached their duty to enter negotiations in good faith, for a refusal to bargain on an erroneous premise of law is no excuse.[31]

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[31] *See, e.g.*, Order of Railroad Telegraphers v. Chicago & Nw. Ry., 362 U.S. 330 (1960). We do not consider attempts to obtain new work rules incompatible with those imposed by the Award or with the report of the Presidential Emergency Board reflective of bad faith on the part of the unions. Compare Pullman Co. v. Order of Railway Conductors, 316 F.2d 556 (7th Cir.), *cert. denied*, 375 U.S. 820 (1963).

IV

Although the statutory duty to bargain continued during the limited duration award, it was not unaffected by the temporary statute and the arbitration award. Their emanations do affect the conceptions of bargaining in good faith, pursuant to a good faith notice, inherent in the scheme of the Railway Labor Act. We shall develop our specific rulings by considering the three groups of unions in chronological order by dates of notices.

A. Order of Railway Conductors and Brakemen (ORCB)

One group of cases before us, Nos. 20158 and 20191, concerns the Order of Railway Conductors and Brakemen (ORCB).[32] On Monday March 23, 1965, that union, expressly relying on the provisions of the Railway Labor Act, served notices on the carriers which proposed a rule requiring not less than one conductor and two brakemen on all classes of road train service thirty days after notice. That date was, obviously, a full nine months prior to the expiration date of the Award. The carriers considered the notices premature and refused to concede any obligation to bargain on the merits of the proposals.[33] ORCB invoked the services of the National Mediation Board, which docketed the case, but suspended action when the District Court held the notices premature.

We think it manifest that the proposal to scrap the Award during its life time could be broached to the car-

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[32] The District Opinion is reported: Akron & B. Belt R.R. v. Order of Railway Conductors, 253 F.Supp. 538 (D.D.C. 1966).

[33] The carriers lodged a further objection on the ground that the ORCB is not the certified bargaining representative of most of the road brakemen directly affected by the notices. Compare Southern Pac. Co. v. Switchmen's Union of North America, 356 F.2d 332, 335 (9th Cir. 1965). The parties have stipulated this issue out of these proceedings.

riers to see if they were interested but could not be presented to them as a subject of bargaining that was mandatory under a statutory obligation. We agree with Judge Bryan's approach that the collective bargaining system of the Railway Labor Act subsumes and presupposes a bargaining "in good faith."[34] The issue of good faith is interlaced with "bargainability"—a term of art which means not only capable of being bargained but also a proper subject of mandatory bargaining. We have already held that the carriers were in bad faith in asserting that they had no legal obligation to bargain during the life of the Award. They had an obligation, we think, to bargain about changes to become effective with the expiration of the Award. But we also think that they had no obligation to bargain about a proposal to make changes during the life of the Award. Such an obligation would be inconsistent with an inherent and essential element of Public Law 88-108, which was intended to promote long range solutions through collective bargaining by removing the need to bargain over immediate crises.

The ORCB argues that the carrier's duty to bargain is reaffirmed by Section III of the award of Board 282 which directs the parties to resume local negotiations on crew consist. We agree that the unions could have called on the carriers to negotiate pursuant to the Award. But this is entirely different from the statutory duty imposed by Section 6 of the Railway Labor Act, upon which the union purported to rely. The Award machinery was essentially different from and displaced the Railway Labor Act concerning rules effective during the life of the Award. This is demonstrable from the provision of the Award that specified that if the parties were unable to arrive at an agreement their dispute should be referred to a local arbitration tribunal. This is, of course, entirely different from and supersedes the basic structure of the Railway

[34] *See* American Airlines Inc. v. Air Line Pilots Ass'n., *supra*, 169 F.Supp. at 793-95.

Labor Act which provides for compulsory arbitration only for minor disputes, and contemplates mediation or voluntary arbitration where agreement has not settled "major disputes," i.e. disputes relating to changes in rates of pay, rules or working conditions.[35] In this context, we agree that these notices were premature.

B. Brotherhood of Railroad Trainmen (BRT)

In another group of cases (Nos. 20152, 20172, 20229 and 20249) we are concerned with the Brotherhood of Railroad Trainmen (BRT).[36]

On June 30, 1965, BRT served a notice proposing that beginning January 26, 1966 (unquestionably after the termination of the Award) a new work rule be inserted in the agreements between the BRT and the carriers requiring that not less than two, or in some cases three, brakemen be included in the "crew consist" of the carrier's runs. In most instances the carriers in turn served counter-proposals with respect to crew consist rules, although they took the formal position that the BRT notices were premature and that during the life of the Award the only proper procedure for instigating crew consist changes was in accordance with Part A(3) of Section III of Award 282.[37]

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[35] *See* Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 722-28 (1945).

[36] These are appeals from judgments following the opinions in Akron & B. Belt R.R. v. Brotherhood Railroad Trainmen, 250 F.Supp. 691, 252 F.Supp. 207, and 254 F.Supp. 306 (D.D.C. 1966).

The Switchmen's Union of North America (SUNA) is also a party in Appeals 20152 and 20172.

[37] "Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen. . . . The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice."

The carriers' denial of an obligation to bargain with the BRT was essentially based on the contention of prematurity which we have already considered and rejected.

We turn to the carriers' current argument that Section 6 of the Railway Labor Act cannot meaningfully impose a duty to bargain during the life of the Award about changes following its expiration, since this would undercut bargaining pursuant to the Award concerning work rules during the life of the Award. We see no inherent inconsistency such as we found in discussion of the ORCB proposals. Bargaining and arbitration for rules to be in effect for a two-year period are not inherently negatived by tandem bargaining under a different system over long-range rules. Conflict in scheduling might be a temporary problem, but it could hardly dignify a complete denial of a duty to bargain over the ultimate and dominant issues.

C. Brotherhood of Locomotive Firemen and Enginemen (BLFE)

The third major group of cases, Nos. 20192, 20193, 20215 and 20216, involves the Brotherhood of Locomotive Firemen and Enginemen (BLFE).[38]

In November 1965 this union served notices to take effect at 12:01 a.m. on March 31, 1966, the day after the Award, as extended by stipulation, was to expire. There were three notices, each made expressly pursuant to the Railway Labor Act. Notice No. 1 related to the types of engine services on which the employment of firemen would be required, and would have pegged employment at a level of 6000 jobs below the terms of the National Diesel Agreement, but far above the level provided by Award 282. Notice No. 2 provided for compensation to firemen who had been relocated, severed, or other-

[38] These are appeals from judgments following the opinion in Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, 253 F.Supp. 682 (D.D.C. 1966).

wise disadvantaged by the operation of Award 282. By stipulation of the parties we need not here consider Notice No. 3, which set out a training program for apprentices. The carriers contended that all such notices were premature, and further contended that the second and third were not even proper subjects of collective bargaining. Several abortive conferences were held, but the carriers resisted any attempts to reach the merits of the proposed rules.

In the BLFE consolidated declaratory judgment actions, the District Court agreed with the carriers on the major points, holding Notices 1 and 2 not only premature but also *non-bargainable* although the carriers had not even challenged the bargainability of the first notice. The court's interjection seems not only to have provided an additional reason for holding that the carriers had not violated a legal obligation in the past, but also to have prompted the carriers to seek restriction of their obligation to bargain in the future.

With the controversy thus expanded when there was already uncertainty as to the exact legal rights of the parties, the issue became the subject of a legal ruling. Since the genie can not be put back into the bottle, we turn to consideration of the soundness of the determination by the District Court, and we conclude that it was not a correct statement of applicable legal doctrine.

The District Court reasoned that—

> the employees may not in the guise of serving notices under Section 6 of the Railway Labor Act, seek to abrogate or set aside the Award. It must be borne in mind that the Award is the result of a compulsory arbitration conduced under a mandate of Congress and has the stamp of judicial approval in the form of a judgment in a proceeding to impeach it. Neither a carrier, nor a union may institute proceedings, directly or indirectly, to set aside any provision of the Award, or the operations or activities that have

> taken place under it or the results that have been achieved.[39]

Since these notices were found not to "relate to matters subject to collective bargaining under the statute," the court declared that they "need not be complied with." 253 F.Supp. at 689. We disagree and are of the view that Congress did not intend that either Public Law 88-108 or Award 282 would permanently excise from the scope of collective bargaining any proposals that otherwise would have been lawful under the Railway Labor Act. Applying this standard, we find that Notice No. 1 falls within the realm of proper collective bargaining, but Notice No. 2 does not.

We begin our reasons for reaching this conclusion with a review of the principles surrounding disputes about bargainability. The settled tradition under the Railway Labor Act reveals a firm obligation on the railroads and their employees to negotiate about changes in working conditions suggested by one side or the other. In the landmark case of *Virginian Ry.* v. *System Federation No. 40, Railway Employees Dep't,* 300 U.S. 515, 548 (1937),[40] Justice Stone held that while the Act does not compel agreement, it does demand those preliminary steps, triggered by a Section 6 notice, without which no agreement could be reached. The minimum requirements are that the employer at least meet with the union to listen to its proposals and to make a reasonable effort to achieve an accord.

The subjects for mandatory mutual consideration are defined in Section 6 merely by reference to "rates of pay,

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[39] Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, *supra* note 38, 253 F.Supp. at 687.

[40] *Accord,* Elgin, J. & E. Ry. v. Burley, *supra* note 35, 325 U.S. at 724-25 (1945).

rules, or working conditions." [41] But the courts have ratified the practice of the industry so that the duty to bargain "generally has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States." [42] That is, "what carriers must legally bargain about is affected by what is in fact bargained about in the railroad world." [43]

The scope of bargainability is extremely broad. The recent guidepost opinion in *Order of Railroad Telegraphers* v. *Chicago & Nw. Ry.*, *supra* note 31, 362 U.S. at 338 (1960) states:

> In an effort to prevent a disruption and stoppage of interstate commerce, the trend of legislation affecting railroads and railroad employees has been to broaden, not narrow, the scope of subjects about which workers and railroads may or must negotiate and bargain collectively. Furthermore, the whole idea of what is bargainable has been greatly affected by the practices and customs of the railroads and their employees themselves. It is too late now to argue that employees can have no collective voice to influence railroads to act in a way that will preserve the interests of the employees as well as the interests of the railroad and the public at large.[44]

The court upheld the right to strike to compel bargaining on a proposed work rule change to prevent the carrier from abolishing positions in existence before a certain date. The court rejected the carrier's contention that the

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[41] *See also* 45 U.S.C. § 152, Seventh (1964).

[42] Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346 (1944).

[43] United Indus. Workers of Seafarers Int'l Union v. Board of Trustees of Galveston Wharves, 351 F.2d 183, 191 (5th Cir. 1965).

[44] *Cf.* Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 209-15 (1964).

proposal was not part of a legitimate "labor dispute" because it sought to perpetuate "wasteful" and "unnecessary" jobs.

The scope of "work rules" discussed by railroads and unions over the past century, including the use of firemen and the manning of trains,[45] has greatly exceeded what a layman might expect the term to include. Bargaining in the rail industry has comprehended fields frequently reserved to management in other industrial contexts. Not until the railroads began to experience the pressure of advancing technology and vigorous competition from other modes of transportation after the Second World War was there any suggestion that some questions of mutual interest might be beyond the pale of required bargaining. Increasingly, the roads have come to use the allegation of non-bargainability, and have sought judicial rulings to protect managerial discretion.[46] Rarely have the courts sanctioned this technique, and recent pronouncements do not augur well for its encouragement.

This setting bids us be chary of the conclusion of the District Court that there was no bargainability in Notice No. 1 which proposed that for the future the parties establish work rules different from those prescribed by the Award for a two-year period. The court stated that Notice No. 1 "demands the restoration of firemen on those runs for which Award 282 expressly held firemen were unnecessary. Obviously, compliance with this notice would be a consent to abrogate and do away with the outcome of the

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[45] See H.R. Rep. No. 713, 88th Cong., 1st Sess. 6 (1963); Comment, *The Railway Work Rules Dispute—A Precedent for Compulsory Arbitration*, 14 DE PAUL L. REV. 115, 119-20 (1964). *See also* Brotherhood of Locomotive Engineers v. Chicago, Rock I. & Pac. R.R., *supra* note 4, 382 U.S. at 429.

[46] See the excellent discussion in Weber, *Public Policy and the Scope of Collective Bargaining*, 13 LAB. L.J. 49 (1962).

arbitration."[47] The District Court gave no clue as to how in its opinion a Section 6 notice could validly propose changes in the work rules established by the Award, by what method, and to what extent.

In our view its conclusion was erroneous. The crisis conditions of 1963 evoked an unusual response from Congress, but one not intended to displace totally the framework of labor relations law and practice in the field. The phrasing of Public Law 88-108 and the reports that accompanied it make clear that Congress in its controlled response did not intend to effect a permanent alteration in development of collective bargaining. The preamble set the tone of the statute, declaring that "it is desirable to achieve [the protection of the national interest] in a manner which preserves and prefers solutions reached through collective bargaining. . . ." According to Section 8, the statute expired of its own terms one-hundred and eighty days after enactment. The Award of the Arbitration Board, by virtue of Section 4, could not "exceed two years from the date the award takes effect, unless the parties agree otherwise." Section IV of the Award itself reiterated the limited duration of the terms imposed and specified it would be in force for two years "unless the parties agree otherwise."

This dual theme of limited survival and contractual freedom infuses a proper resolution of this case, and does so with a spirit that is frustrated by the District Court's conclusions of non-bargainability (and indeed of prematurity). In providing in Section 3 of the law that the Award would be "binding on both the carrier and organization parties" and constitute a "complete and final disposition" of the major issues, Congress meant only that the Board's conclusions were to have the status of arbitration awards in the classic sense, not merely of mediation sug-

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[47] Bangor & A.R.R. v. Brotherhood of Locomotive Firemen, *supra* note 38, 253 F.Supp. at 688.

gestions or fact-finding as in the ordinary major dispute under the Railway Labor Act. But Congress contemplated and intended that the parties could continue to work out a settlement different from that imposed by the Board to be effective for a limited two-year period. In submitting the Administration draft to Congress, "President Kennedy repeatedly emphasized to the Congress his hope that the dispute could eventually be settled by collective bargaining." *Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R.R., supra* note 4, 382 U.S. at 431. The President "expressed no desire to have Congress pass a law that would finally and completely dispose of the problem," observing that it would be " 'wholly inappropriate to make general and permanent changes in our labor relations statutes. . . .' " *Id.* at 432. And the Congress "enacted the bill proposed by the President" with but "one significant change" not relevant here. *Ibid.*

Congress emphasized in unambiguous terms that the parties were not to be locked in by the terms of the Award on the firemen and crew consist issues:

> It should be especially noted that, although the joint resolution provides for arbitration on these two issues, the parties may still bargain collectively on these issues, and resolve them among themselves. This process may take place before the arbitration board is established; after the board has initiated its proceedings; and may also take place after the board has made an award. By agreement, the parties may make the appointment of the board unnecessary; may make the decision of the board unnecessary; *and may supersede the decision of the board—all through collective bargaining.* H.R. Rep. No. 713, 88th Cong., 1st Sess. 13 (1963). (Emphasis added.)

We find it impossible to accommodate the operative language and animating philosophy of Public Law 88-108 with the District Court's holding that Notice No. 1 was non-bargainable. The carriers argue now that the District

Court did not foreclose all possibility of altering the rules imposed by the Board, but meant only to vindicate its efforts by precluding return to the status quo ante. Even if we agreed that the BLFE's Notice No. 1 would have that effect,[48] nothing we detect forbids proposing just such a complete regression. At least, we hold that under the Railway Labor Act, and after taking into account such qualification of that law as is fairly implied from Public Law 88-108, the BLFE could legitimately require that the carriers negotiate about these proposals for work rules to be operative in the future.

Nothing compels the carriers to accede totally to changes proposed in Notice No. 1, and indeed in light of the realities of collective bargaining it is unlikely that the BLFE expects to insist on complete acceptance of its suggestions. But certainly there was no disability prohibiting the opener that the BLFE included in its first notice.

Notice No. 2, however, falls in a different category. It did not propose certain rule changes to govern the future operation of the railroads. It was aimed directly and undeniably at vitiating the Award of the Arbitration Board, an Award that has long since received judicial confirmance and been fully implemented by the parties. Although Notice No. 2 expressly refers to Section 6 of the Railway Labor Act, the notice on its face demonstrates the irrelevance of Section 6, and the "major disputes" provisions of the Railway Labor Act in general.

Notice No. 2 explicitly proposed that "employees whose employment and seniority were terminated by the application or misapplication of the Award of Arbitration Board 282 will, on [the expiration of the Award as extended by

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[48] We note, however, that apparently 6000 fewer firemen would have been required under the proposed rules than the National Diesel Agreement had provided.

stipulation], be recalled and restored to the seniority roster and employed with their original seniority date and used as firemen (helpers)...." In subsequent sections, the notice proposed that employees terminated in the course of implementing Award 282 be reimbursed for monetary loss due to the termination and deprivation of seniority, including expenses incurred for meals, travel, lodging, and change of residence when relocating for other assignments.

These proposals relate to alleged past grievances. We are concerned here with bargainability, and instinct in the essence of collective bargaining is a notion of mutality, that if a subject is brought up each side has at least the authority both to offer and to concede.

What is the status of the union concerning the subject it proposed for bargaining in Notice No. 2? We turn to *Elgin J. & E. Ry.* v. *Burley, supra* note 35, 325 U.S. at 739:

> To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract "concerning rates of pay, rules, or working conditions." It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a preexisting collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.
>
> But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory

boundary between collective bargaining and the settlement of grievances.

The Court held that a union had no lawful authority to bargain for some of its members in settling claims they asserted against the railroad arising from the application of new work rules. The court observed that the railroad was not entitled to assume from the union's status as bargaining agent that it had the right to settle claims for past grievances, and that any agreements reached were without legal significance.

This analysis has an immediate bearing on our situation. The BLFE proposed that the carriers jettison the rights that had accrued to them under the Award, for the Notice by its terms is limited to rehiring and reimbursing those employees terminated in implementing Award 282. If Award 282 meant anything it provided the sanction of Congress for the railroads' authority to discharge thousands of firemen. This permission was sharply narrowed by stringent protective provisions under which severed employees have already received many millions of dollars in benefits. The rights to these payments vested when the employees were discharged pursuant to the Award. The BLFE Notice proposed that the carriers renounce their vested rights. But the bargainability of this subject matter as a proposal for a change in "work rules" is undercut by the fact that the *Elgin* case squarely denies the BLFE any warrant in law to "bargain" over any possible concession on the employee's side to make a refund, or even partial refund, of any severance benefits already vested or paid. Clearly a proposal that cannot lawfully be adopted is non-bargainable.[49] Since the union could not bargain away any part of the rights that accrued to employees under the Award, it could not compel the

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[49] *See* Southern Pac. Co. v. Switchmen's Union of North America, *supra* note 33, 356 F.2d at 334-35.

railroads to bargain on a proposal that they surrender rights that accrued to the carriers under the Award, which defined and limited the liability of the carriers arising from changes made in accordance with the Award.

In Notice No. 2 the union claimed there had been misapplication of the award. As to this it suffices to point out that Section 8 of the Railway Labor Act [50] and Section 4 of Public Law 88-108 permit the union to bring forward, questions of interpretation as to the scope and applicability of the Award for resolution by Board 282.[51] But these would not be comprehended by Section 6 of the Railway Labor Act, governing proposed changes in work rules, classified as major disputes.[52] The rest of Notice No. 2 is inherently an attack on the fairness of the Award —and that is not bargainable under Section 6 consistently with the purpose of Public Law 88-108, and the Award thereunder and its judicial confirmance.

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It is our hope and contemplation that any further litigation will be conducted with a fresh outlook. The halls of justice should not be an arena where gladiators are spurred on in desperate combat. They provide a forum where legal disputes can be settled, with a minimum of rancor, so as to further the Congressional objective of

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[50] 45 U.S.C. § 158(m) (1964).

[51] *See* Brotherhood of Railroad Trainmen v. Terminal R.R. Ass'n, —— U.S.App.D.C. ——, —— F.2d —— (No. 20135), decided this day.

[52] The BLFE contends in its brief that there is nothing wrong with retroactive contract proposals and agreements, and suggests that they are used frequently in industrial relations. Whatever may be the general practice, and regardless of what other provisions of the Railway Labor Act may require, there is no duty to bargain collectively over the settlement of past grievances that is imposed by Section 6.

agreement and, if possible, harmony between carriers and unions.[53]

The parties are directed to submit within 10 days a proposed judgment, and to confer and endeavor to agree thereon. At that time the parties may also request supplemental rulings on any matters that have not been discussed in this opinion.

Affirmed in part, reversed in part.

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[53] This court's opinions in the instant cases will undoubtedly have bearing on others arising in one way or other out of Award 282.

Before the present division are ten cases, Nos. 20152, 20158, 20172, 20191, 20192, 20193, 20215, 20216, 20229 and 20249.

Before the instant division also is No. 20316, decided today.

Previously argued before Judges Bastian, Burger and Wright are five cases, Nos. 19867, 20003, 20004, 20212 and 20213.

Case No. 20135, decided today, came before Chief Judge Bazelon, Senior Circuit Judge Edgerton and Circuit Judge Coffin, (of the First Circuit, sitting by designation).

Hitherto in the District Court, cases involving the railway work rules disputes have been referred to a single District Judge. The fact that we have differed from him in some aspects of relief granted or of the basis of rulings should not be permitted to obscure our appreciation for the prodigious effort he has made in response to so difficult an assignment, and for the commendable manner in which he has approached so many novel and complex questions.

In today's text we have undertaken definition of the basic legal principles applicable to future consideration of the issues. It would seem that sound judicial administration of the District Court's business will be served by rotation of this assignment at this juncture. We have in mind avoidance of further burdening of this District Judge and the broadening of application of pertinent judicial expertise and exposure in meeting our common problems in this area. So it is that we have ourselves achieved some distribution of the work ad, and we regretfully assume that there may yet be heavy demands on judicial manpower in the District Court by reason of railroad work rules controversies.

APPENDIX

Public Law 88-108

Act of August 28, 1963, 77 Stat. 132.

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress find that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the fireman (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dis-

pute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any of such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

Sec. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member of members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Notwithstanding any other provision of law, the National

Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

Sec. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

Sec. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's

award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

Sec. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

Sec. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

Sec. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the nar-

rowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

Sec. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

Sec. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Approved August 28, 1963.

APPENDIX F

Appeals from the United States District Court
for the District of Columbia

Supplemental Opinion Filed July 31, 1967

Mr. Milton Kramer was on the brief for appellants in Nos. 20,152, 20,229 and 20,249 and appellees in No. 20,172.

Mr. James D. Hill for appellant in No. 20,158 and appellee in No. 20,191.

Mr. Joseph L. Ruah, Jr., with whom *Messrs. John Silard, Daniel H. Pollitt, Isaac N. Groner, David Epstein* and *Stephen E. Moss,* were on the brief for appellant in Nos. 20,192 and 20,193 and appellee in Nos. 20,215 and 20,216.

Mr. Francis M. Shea, with whom *Mr. Richard T. Conway* was on the brief for appellants in Nos. 20,172, 20,191, 20,215 and 20,216 and appellees in Nos. 20,152, 20,158, 20,192, 20,193, 20,229 and 20,249. *Messrs. David Booth Beers* and *Ralph J. Moore, Jr.,* also entered appearances for appellants in Nos. 20,215 and 20,216.

Before DANAHER, *Circuit Judge*, BASTIAN, *Senior Circuit Judge*, and LEVENTHAL, *Circuit Judge.*

Supplemental Opinion

LEVENTHAL, *Circuit Judge:* On May 12, 1967, this court released its opinion disposing of many of the legal questions arising from the railway work rules disputes and the compulsory arbitration statute passed by Congress in 1963 to handle the controversies. Because of the number and complexity of the issues, we directed the parties to

confer in an effort to propose a judgment embodying our rulings, and invited them to request supplemental rulings on any points not explicitly covered by our opinion.

The parties have submitted numerous requests for supplemental rulings, for reconsideration, and for clarification.

I *The New Plateau Work Rules Continuing In Effect*

A. Brotherhood of Railroad Trainmen (BRT)

The carriers contend that our "new plateau" rationale, holding that the substantive terms effected by Award 282 continue in force after the formal expiration date of the Award until changed pursuant to the Railway Labor Act, logically requires reversal of the District Court's ruling that the procedures established by Award 282 for special arbitaration awards on the trainmen issue lapsed at the termination of the Award. We disagree.

Our decision rests on an accommodation of the sometimes divergent directives of Public Law 88-108, Award 282, and the Railway Labor Act. Throughout, our touchstone has been our understanding of dominant Congressional intention. We viewed Congressional intervention in 1963 as reflecting a sensitivity to the dangers of imposing drastic changes on the pattern of railway labor collective bargaining.

The point is simply this: We think Congress meant that changes in substantive work rules issuing forth after the expiration of Award 282 should not be wrought by the compulsory edict of a board, but should either be reached by agreement of the parties or should be born out of their actions under the Railway Labor Act, an act which regulates their conduct of bargaining so as to promote the possibility of agreement, with the assistance of the National Mediation Board or other special boards.

This dominant Congressional intention means that a difference must be drawn between those actions of Board

282 and its agents prior to the expiration date of Award 282 which effected changes in substantive work rules, and those actions which merely constituted issuance of procedures for promulgating future changes in substantive work rules. The completed changes in substantive work rules continue on—unless and until changed again in accordance with the Railway Labor Act. But there is no continuance of what are in effect only procedures for issuing future changes in substantive work rules.

Those procedures constituted a special mechanism for making changes by award, and were intended to have only a two-year life. Upon the expiration of the two-year period the special machinery was exhausted and in the absence of agreement only the system of the Railway Labor Act was available for future changes in substantive work rules. Consequently, in the absence of ratification by agreement of the parties, a local adjustment board had no independent legal authority that would permit it to achieve an alteration in substantive work rules subsequent to the expiration of the two-year period.

B. Brotherhood of Locomotive Firemen and Enginemen (BLFE)

The parties are in disagreement as to the import for the Firemen of our ruling as to the Trainmen, a ruling announced in our May 12 opinion and adhered to on reconsideration for the reasons noted above.

On the firemen issue, Board 282 decided that most firemen could be dispensed with for other than steam power engines. It developed a procedure permitting the "blanking" of firemen positions as follows: Each carrier could list those engine crews on which it thought firemen unnecessary for reasons of safety or workload. These positions could then be blanked, except that each local union chairman was given the right within 30 days of receipt

of the carrier's list to designate up to ten percent of these crews as requiring continued employment of firemen. The Award refers to this right to designation as based upon considerations of safety, undue work burden and adequate and safe service to the public, but provided that the designation shall not be subject to challenge or review. This procedure was designed to take place at three month intervals.

A dispute arose when it came time to decide what happened to this procedure, and the results it had reaped, when Award 282 expired.

The carriers insisted that when Award 282 expired the procedures continued in effect as part of the new plateau of work rules, and constituted a continuing mechanism for reducing the employment of firemen unless and until changed in accordance with Section 6 of the Railway Labor Act. The BLFE argued both that this procedure passed out of existence when the Award terminated, and that the changes it had effected lapsed, so that positions blanked during the life of the Award were resurrected. The District Court ruled that a "new plateau" had been created that preserved what had been accomplished by the carriers under the Award in reducing firemen's positions, but held that the carriers could no longer resort to the machinery created by the Award to make further job cuts. The District Court concluded, however, that the carriers were prevented only from taking "affirmative acts" in reliance on the Award, but explained that this did not prevent the carriers from refusing to fill vacancies resulting from natural attrition. The underlying premise of that court's decision was that Award 282 superseded the requirements of the National Diesel Agreement which would otherwise demand the use of firemen on all locomotives.

As set forth in our May 12 opinion, this court has rejected, though for somewhat different reasons, the con-

tention of the BLFE that after March 30, 1966, the *status quo ante* compulsory arbitration was automatically restored. While we explicitly ruled that the procedure created by the Board for making new crew consist rules expired when the Award did, we did not previously examine the problem presented in the firemen context.

The BLFE insists that there is no tenable distinction whereby firemen should be subject to continuing reductions under the Award though trainmen are not similarly affected. The carriers concede that it is difficult to distinguish the two situations, but suggest that the Award might be viewed as merely setting forth a procedure for crew consist changes but as directly affecting the firemen rules.

Once again we find both parties somewhat out of alignment with our basic premises. We have endeavored to make it clear that nothing of the Award survived its expiration date. It is the work rules resulting from the Award that endure, by virtue of the Railway Labor Act; they are deemed to be incorporated into the prior agreements of the parties that themselves endure by virtue of the Railway Labor Act unless and until changed in accordance with that statute. We must therefore discern what "work rules" were put into effect under and prior to the expiration of Award 282.

The Award did not dispense with the use of firemen. It began by continuing in force all "agreements, rules, regulations, interpretations, and practices, however established," except as modified by the Award. The Award provided procedures whereby the carriers could mark firemen jobs for extinction, and also established a reciprocal power in the local BLFE chairman to immunize from elimination ten percent of the crews listed. The Opinion of the Neutral Members of Board 282 makes abundantly clear that the Board recognized that the Award had the

effect only of sanctioning a procedure of limited duration for accomplishing a reduction in crew consist and the use of firemen. The Board explained that it was conscious that the immediate impact of the Award might be small, but that this was a deliberate choice reflecting concern for the human factor in the equation and the goal that the Award would establish some principles that could contribute to a final solution to the problems:

> "The Board's award will remain in force only two years. Within that time the effect of attrition may be such that the number of firemen or train crew jobs actually eliminated may be comparatively small. *Opinion of Neutral Members,* 41 LAB. ARB. 680, 681.

The Board members themselves characterized what they did as having "established a *procedure* for determining whether, considering safety, workload, and adequacy of transportation service, particular jobs should be made subject to elimination." (p. 681) (Emphasis added.). In explaining why the Award provided that the union could insist on saving ten percent of the jobs marked for elimination, the Neutral Members reasoned that this procedure would obviate the possibility of objections, based on safety or convenience, to individual proposals for job reduction. The underlying premise, as explicated by the Board, was that the Award would be able to authorize such reductions only during two years, and unless an efficient procedure were provided for making specific decisions "the likelihood of reducing [the number of disputes over individual jobs] significantly in a two-year period would not be very great." (p. 690). Because of the two-year limitation on the Award, the Board doubted that any standards it might prescribe could be applied in particular disputes "in sufficient time to yield any significant results." (p. 690).

As the event turned out the carriers used the Award's procedures to terminate many more firemen jobs than the

Board predicted.[1] The Neutral Members' underestimate does not undercut but rather underlines the view that the mechanics for reduction in firemen jobs were procedures of necessarily limited duration, rather than work rules with continuing vitality.

Our conclusion is that the provisions in the Award for establishing new firemen levels did not constitute "work rules" in the classic sense, as we have used and applied that term, but instead are more accurately described as procedures for establishing new work rules. The history of labor relations agreements in this industry reveals that the manning work rules were expressed in terms of ultimate results, like one-conductor-and-three-brakemen, or firemen-required-on-all-freight-locomotives, and were not formulated in terms of a methodological approach. This practical construction of the concept of work rules is reinforced by the Board's expressions treating the mechanics of lists and designations as procedures. Accordingly, for purposes of determining what "work rules" were in force on the last day of the life of Award 282, we do not consider the procedures provided by the Award for changing job requirements as being themselves part of the substantive "work rules." These procedures, like the procedures for changing substantive work rules for crew consist of trainmen, had no effectiveness after the expiration of the Award.

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[1] In the course of Congressional testimony, Chairman Ralph Seward of Board 282 and Assistant Secretary of Labor James Reynolds indicated that their original expectation was that the procedures would lead to a reduction of about 5500 jobs, rather than the 18000 the carriers succeeded in blanking. *See Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce,* 89th Cong., 1st Sess., ser. 89-45 at 363-64, 465-66 (1965). And according to Senator McGee, the number of firemen eliminated also exceeded the expectations of "Members of the U.S. Senate." *Hearings on the Administration of Public Law 88-108 Before the Senate Comm. on Commerce,* 89th Cong., 2d Sess., ser. 89-56, at 1030 (1966).

This construction also gives what we consider the appropriate effect to the undeniably significant provisions in Public Law 88-108 and Award 282 that limited the effectivness of the Award to two years. Since the Award did not become effective for sixty days after filing, the parties had more than two full years to plan its implementation. The pre-existing work rules, contained in the National Diesel Agreement of 1950, stipulated that "A firemen, or a helper, taken from the seniority ranks of the firemen, shall be employed on all locomotives." Award 282 continued this requirement (and any others stemming from agreement or practice), until changed in accordance with the Award. For two years plus, the carriers had the machinery for proposing, at three month intervals, the crews that they thought could safely and efficiently dispense with firemen positions. The fruits of these notices and negotiations, after adjustment for the Union's ten percent retention, effected what must be rgarded as new "rules" applicable to the particular runs involved. But when the Award expired, so did the procedures it suggested. What survives is the complex of work rules in force on the last day prescribing the substantive terms that controlled the use of firemen on individual runs.

In consequence, a carrier is not only prevented from taking "affirmative acts" under the Award to reduce the use of firemen, as the District Court properly held, but also, if the carrier was required to keep a firemen on a particular crew as of the last day of the Award, it cannot thereafter change the work rule by discontinuing that position, except by agreement or in accordance with Section 6. The work rule that continues in force provides for a fireman on this crew, and that is not changed because the particular fireman on duty dies or retires.

Conversely, however, if the work rule in effect on the last day of the Award provided that a fireman was not required for a particular engine crew—because that crew

was included on the carrier's list of proposed blankable jobs and the union's local chairman did not designate it for retention of a fireman, within the ten percent of crews he could control—the work rule does not require a fireman on that crew even though for one reason or another the carrier had not removed or transferred that fireman by the end of the effective period of the Award.[2] The carrier may thereafter transfer him, or refuse to replace him when he dies or retires. Such action would not constitute a change in work rules but simply an action in accordance with the work rule in force on the critical date, a rule which provided that no fireman was required for that crew.

The National Diesel Agreement was not set aside by the Board. As already noted, the opening section of the Award provided that agreements in force continued in effect except as they were modified by the Award. The Award provided a procedure for modifications during the two-year life of the Award. We recognize that it may be turning back the clock to an era that two presidential boards and the Neutral Members of Board 282 have agreed is technologically outdated, but taking into account the structure of Award 282 as issued, we see no alternative to holding that any new runs created after Award 282 are subject to the National Diesel Agreement, and its requirement of a fireman on each engine crew.

Moreover, the National Diesel Agreement is in effect even though the only reason why a change in its work rule was not made under the Award during its life time was the fact that the change was blocked by a state's full crew law. The Supreme Court has expressly held that while such state law was in effect the Board had no capacity to

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[2] The work rules effectuating the changes made under the Award included the ancillary protective provisions of Part II.C for individuals transferred or separated in implementing the change. These work rules continued in effect after the Award.

make a change contrary to its provisions. *See Brotherhood of Locomotive Engineers* v. *Chicago, Rock I. & Pac. R. R.*, 382 U.S. 423 (1966). The opening sections of the Award dealing with the use of firemen and with crew consists provided for the continuation of work rules, however established, unless changed pursuant to the Award. The repeal of a full crew law subsequent to the expiration of Award 282 came after expiration of the Board's authority under the temporary statute and after expiration of the power of a carrier to invoke the procedures of the Award.

II *Validity of Awards Made January 25, 1966.*

In one respect we have decided to grant reconsideration and modify our opinion as requested by the carriers. In our opinion of May 12, we held that Award 282 was no longer in existence on January 25, 1966, when a special adjustment board rendered crew consist awards between the BRT and two carriers, and that therefore these awards were without legal significance.

We rejected by implication the carriers' argument in brief that the BRT had stipulated to the contrary. On rehearing the carriers point out decisions interpreting statutory provisions that an act be done within a specified period from the date of another action or event so that the initial or trigger date is excluded from the computation. As we were aware, that is of course the modern doctrine and is established by the decisions of this court among others.[3] It is the rule adopted by Rule 6 of the Federal Rules of Civil Procedure. We thought this rule inapplicable because the starting date did not involve problems of a fractional day, and was in turn determined by

[3] *E.g.*, Freeman v. Pew, 61 App. D.C. 223, 59 F. 2d 1037 (1932); Burnet v. Willingham Loan & Trust Co., 282 U. S. 437, 439-40 (1931); Prince v. United States, 185 F. Supp. 269, 271-272 (E.D. Wis. 1960).

a still earlier computation beginning with an initial date that was concededly excluded from computation. This led us to the view that the two-year period prescribed by the Act as the life of the Award did not extend beyond 731 full days (two years of 365 days each, plus February 29, 1964), and that the Award which started at 12:01 a.m. on January 25, 1964, should not be stretched to include the 732nd day of January 25, 1966. We felt that in the peculiar setting of this law that legislative consideration should prevail over the customary formula for computing time.

On further reflection, we think that while this analysis may be sound for an appraisal of the problem in the first instance, a doctrine not adverted to by the parties pre-empts the question. There is hornbook learning to the effect that where there is doubtful language in a statute for performance of an act, the courts prefer that which will confirm rather than destroy any bona fide transaction or title. 52 Am. Jur. *Time* § 18 (1944). This is powerfully underscored by the doctrine, highly relevant to modern needs, that where statutes have been entrusted to administrative agencies for implementation, their construction should be given effect unless plainly unreasonable or in conflict with the plain intent of the legislature.

Board 282 was keenly aware of the problems it faced in possessing only temporary authority. It purposefully selected a standard for the manning rule for firemen that could practicably be administered within that limited time. When the special board assumed that it had the authority to act on January 25, 1966, it must be presumed to have considered the question carefully and with a view to conforming to the intent of Congress as nearly as it could discern that intent.

We note that the Union did not promptly protest the awards as untimely. And further indication that even the Union regarded the time question as at least doubtful

appears from the fact that their notices used a January 26, 1966 date as the effective date for proposed changes. We acquiesce in the interpretation of this doubtful question by the special board involved, since we cannot say this interpretation was unreasonable or violated any plainly ascertainable legislative intent. Accordingly we honor the board's conclusion that January 25, 1966 was the final day of the Award, and hold that the special arbitration awards rendered on that date were effective.

III *Applicability of Section 8 of the Norris-La Guardia Act.*

A. Brotherhood of Railroad Trainmen (BRT)

Appellant Union seeks a ruling that even assuming the District Court had jurisdiction to issue a restraining order, the issuance of the order reflected error in this case.

We are clear that the District Court was correct in holding that it had jurisdiction to enjoin a violation of the Railway Labor Act, and that this jurisdiction was not negatived by or subject to Section 4 of the Norris-La Guardia Act. We affirmed that conclusion in No. 20316, and fully adhere to that ruling.

Although the District Court had jurisdiction to issue the restraining order we think it erred in doing so because—as we subsequently held in our May 12, 1967 ruling—the complainant carriers had failed to comply with their obligations under the Railway Labor Act. Section 8 of the Norris-La Guardia Act, 29 U.S.C. § 108 (1964), provides that a federal court shall not grant a restraining order or injunction in a labor dispute where the complainant "has failed to comply with any obligation imposed by law which is involved in the labor dispute in question."

The issuance of the restraining order was conditioned on the carriers' posting a bond to make good damages, not to exceed $10,000, sustained by any party wrongfully

restrained. We think the Union, which had to obey the injunction or suffer penalties for contempt of court, is entitled to a ruling from this court that vacates an erroneous determination of the District Court, although of course we do not purport to describe what if anything the Union is entitled to collect on the bond.

The District Court erred in concluding that because it held, correctly, that the action was not subject to Section 4 of the Norris-La Guardia Act, which would have ousted the court of jurisdiction, it necessarily followed that the "clean hands" provision of Section 8 of the Norris-La Guardia Act was likewise wholly inapplicable. The Supreme Court has said, speaking through the Chief Justice, that "there must be an accommodation" of this Act with the Railway Labor Act. *Brotherhood of Railroad Trainmen* v. *Chicago R. & Ind. R.R.*, 353 U.S. 30, 40 (1957). That principle of accommodation means that actions to enjoin violations of the Railway Labor Act may be maintained without regard to Section 4 of the Norris-La Guardia Act, and yet be subject to Section 8 of that Act. That is the conclusion of other courts which have considered the matter,[4] and we agree. The point is, simply, that Congress did contemplate actions to effectuate the Railway Labor Act by enjoining violations.[5] That purpose

[4] *See* Rutland Ry. v. Brotherhood of Locomotive Eng'rs, 307 F. 2d 21, 37-40 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); Chicago, Rock I. & Pac. R.R. v. Switchmen's Union, 292 F. 2d 61, 64-66 (2d Cir. 1961), *cert. denied*, 370 U.S. 936 (1962); Elgin, J. & E. Ry. v. Brotherhood of Railroad Trainmen, 302 F. 2d 540, 544-45 (7th Cir.), *cert. denied*, 371 U.S. 823 (1962); Manning v. American Airlines, Inc., 221 F. Supp. 301, 304-06 (S.D.N.Y. 1963); *cf.* Brotherhood of Railroad Trainmen v. Toledo P. & W.R.R., 321 U.S. 50, 60-65 (1944); Brotherhood of Railway Clerks v. Florida E. C. Ry., 384 U.S. 238, 247 n. 8 (1966); Brotherhood of Railroad Carmen v. Chicago & Nw. Ry., 354 F. 2d 786, 794-76 (8th Cir. 1965).

[5] Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

would be utterly defeated if the federal court actions involved were subject to Section 4 of the Norris-La Guardia Act, which had provisions for withholding injunctions in labor disputes reflecting entirely different objectives.

On the other hand a ruling that Section 8 of the Norris-La Guardia Act is applicable to actions to enjoin violations of the Railway Labor Act would not trammel but would rather further the effectuation of that Railway Labor Act, for it ensures compliance by complainant carrier or union which cannot seek an injunction until and unless it has discharged the obligations imposed by the Railway Labor Act.

It may be that in a particular case the District Court might conclude that the imperatives of the Railway Labor Act override Section 8—a statutory focusing so to speak of an equity approach whereby lack of clean hands may be overcome by a balancing of interests, particularly where it is the public interest involved. In a particular case the District Court might conclude that the question of the applicability of Section 8 was doubtful, would require time to explore, and that the restraining order should issue forthwith to avoid jeopardizing the Railway Labor Act. Such approaches would recognize that Section 8 of the Norris-La Guardia Act has some applicability, and is a legislative instruction that weighs heavier in the scale than the clean hands doctrine taken merely as a general equity maxim, yet is overborne by requirements of the Railway Labor Act. Here, however, the approach of the District Court was that Section 8 of the Norris-La Guardia Act was completely inapplicable and that was error. In saying that the restraining order was erroneously entered, however, we do not mean that would excuse a contemptuous violation.

We have said enough to demonstrate that the approach used by the District Court was erroneous. As we have decided, the complainants lack clean hands and the

defendants were not threatening the violation. Therefore, we now rule that the District Court, taking all circumstances into consideration, should permit the Union to recover on the $10,000 bond if indeed it can establish that it sustained ascertainable damage from the issuance of the restraining order.

B. Order of Railway Conductors and Brakemen (ORCB)

This Union argues that, even assuming its notices of March 23, 1965 were premature (as held in our May 12 opinion), the temporary restraining order against the strike was invalid because Section 8 of the Norris-La Guardia Act prohibits the granting of a restraining order to a complainant "who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."

Neither the unclean hands doctrine, nor its crystallization in Section 8 of the Norris-La Guardia Act, operates to deny relief to a complainant merely because it has declined to short-circuit the plan envisaged by Congress for obtaining a durable resolution of vexing questions. Congress contemplated that the parties would resume negotiation after they had garnered experience from actually living with the rules decided upon by the arbitrators after giving "due consideration to the effect . . . upon adequate and safe transportation service to the public and upon the interests of the carrier and employees." (*See* Section 7(a) of Public Law 88-108). The general requirement in Section 8 for reasonable efforts at negotiation does not contemplate a departure from the assumptions of a specific statutory plan. Therefore, entry of the restraining order was not improper.

* * *

The Unions have assumed that a full decree will be entered by this court. We think the proper course is to

remand for the District Court to enter decrees in accordance with our rulings. We approve its approach on matters drawn into question except as indicated in our opinions.[6]

The various judgments and decrees appealed from are accordingly vacated and the causes remanded for the entry of fresh decrees not inconsistent with our opinions.

So ordered.

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[6] We affirm both the reasoning and result reached by the District Court in construing the effect of the agreements entered into between the BRT and the Kansas City Southern Railway and Louisiana & Arkansas Railway, and the Wichita Terminal Association. We agree that the correspondence between the BRT and the Richmond, Fredericksburg & Potomac Railroad constituted a crew consist agreement of the same duration as an award by a special adjustment board.

We also approve the District Court's holding that Southern Railway Company and its subsidiaries were proper parties plaintiff in suits involving the ORCB and were covered by Award 282.

APPENDIX G

Before: Danaher, Circuit Judge; Bastian, Senior Circuit Judge; and Leventhal, Circuit Judge.

Judgment

These causes came on for hearings on the records of the District Court and the briefs submitted by counsel, and were argued by counsel.

On May 12, 1967, this court filed an opinion in the above-captioned causes, and invited the parties to submit proposed judgments and to request supplemental rulings within ten days thereafter.

The railroads submitted proposed judgments, and requests for supplemental rulings, and filed petitions for rehearing. The unions also submitted proposed judgments and requests for supplemental rulings, and filed oppositions to the railroads' petitions for rehearing.

Upon consideration of the foregoing, it is

ORDERED AND ADJUDGED by the Court that, except insofar as they are granted in the supplemental opinion filed this date, the aforsaid petitions for rehearing are denied; and it is

FURTHER ORDERED AND ADJUDGED by the Court that, insofar as reflected in the supplemental opinion filed this date, the requests for supplemental rulings are granted; and it is

FURTHER ORDERED AND ADJUDGED by the Court that these cases are remanded to the District Court with directions to vacate the orders and decrees appealed from herein and enter orders and decrees consistent with the opinion of this Court filed May 12, 1967, and the supplemental opinion filed this date.

Per Curiam.

APPENDIX H

Before: Danher, Circuit Judge; Bastian, Senior Circuit Judge; and Leventhal, Circuit Judge, in Chambers.

Memorandum and Order*

These cases were argued on cross-appeals filed by the Brotherhood of Locomotive Firemen and Enginemen (BLFE) in Nos. 20192 and 20193, and by the carriers, Bangor and Aroostook Railroad Co. et al., in Nos. 20215 and 20216.

This court rendered an opinion in these cases, and others consolidated therewith, on May 12, 1967, and filed a supplemental opinion on July 31, 1967.

The carriers filed a petition for rehearing and clarification on August 15, 1967, and on August 25, the BLFE filed a memorandum in opposition to that petition.

The carriers assert, among other things, that this court's opinion, and particularly its supplemental opinion, reflects a misunderstanding of the meaning and application of Award 282 intended by the Board of Arbitration (Board 282).

This court has determined that Board 282 has continuing vitality for deciding questions of interpretation as to the scope and application of the Award. (Opinion of May 12, 1967, pp. 39-40.) It has also made clear that even on a question where the Board did not have final authority, i.e. interpretation of the underlying statute, the court would accept the interpretation of the Board even though contrary to the interpretation the court would itself have rendered, so long as the Board's interpretation was not unreasonable or contrary to ascertainable legislative intent. (Supplemental opinion of July 31, 1967, p. 15).

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* In *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook Railroad Company, et al.*, Nos. 20192-20193, 20215 and 20216.

ACCORDINGLY, now upon consideration of the foregoing, of this court's opinions above cited, and on the record before the court,

It is ORDERED by the court that the carriers' petition of August 15, 1967 is denied, without prejudice however to the Board's seeking leave within thirty days from the date of this order to submit as amicus curiae a showing of respect, if any there be, in which the opinions of this court are inconsistent with the understanding of Board 282 as to the proper meaning and applicability of its award. Issuance of the mandate will be stayed for thirty days.

It is FURTHER ORDERED that the court's supplemental opinion of July 31 be clarified by the addition of the following as a final paragraph of part I of the opinion (p. 13 of slip opinion).

"The carriers argue in effect that the Award at least authorized the carriers to blank firemen positions during the lifetime of the Award, with this personnel action remaining in a state of suspended animation until its vitalization upon repeal of the full crew law. The Court noted in Rock Island, supra, 382 U.S. at 423:

> Congress wanted to do as little as possible in solving the dispute which was before it, and we note that this dispute was not over the size of crews in States which had full-crew laws.

The Board authorized the carriers to list jobs for blanking, and thus provide a classification "when and if such full crew laws are amended or repealed.", Answer of May 17, 1964, to Carriers' Question No. 5 under Section II—Part B(1) and B(2). But this conditional blanking was only available as an advance procedure made fruitful if the necessary condition materialized during the 2-year lifetime of the Award. *See Opinion of Neutral Members,* quoted *supra,* 41 LAB. ARB. at 661. The Board's energy was not limited to "the dispute which was before it [Con-

gress]'' at the passage of the law, but also extended to firemen manning disputes arising during the critical 2-year period. But the Board's order and interpretations cannot be stretched beyond the Congressional frame of reference to resolve academic differences or disputes that were neither in being at the time nor projected as arising during the 2-year period.''

So ordered.

APPENDIX I

Award

This Award is made pursuant to Public Law 88-108, 88th Congress, S.J. Res. 102, enacted August 28, 1963.

The organization parties to the dispute named H. E. Gilbert and R. H. McDonald as organization members of this Arbitration Board. The carrier parties to the dispute named Guy W. Knight and J. E. Wolfe as carrier members of the Board. Benjamin Aaron, James J. Healy, and Ralph T. Seward were named as neutral members by the President.

On September 11, 1963, the Board met, elected its Chairman and adopted rules of procedure. On September 23, 1963, in accordance with Section 3 of the Joint Resolution, the Secretary of Labor furnished to the Board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, together with memorandums setting forth his understanding of the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement.

Public hearings were held in Washington, D. C., on twenty-nine days between September 24 and November 2, 1963, at which witnesses were heard, exhibits introduced and arguments made. Rebuttal exhibits and written arguments were received on November 9, 1963.

On November 6 and 7, 1963, the neutral members of the Board, with the agreement of the parties, visited certain railroad yards in the Chicago area. The sole purpose of these visits was to assist the neutral members in understanding the evidence and arguments presented at the formal hearings and nothing said or shown to them during these visits was accepted as evidence.

During the course of the proceedings, questions arose as to whether certain carriers and certain of their employees were or properly should be parties to the dispute and subject to the Board's jurisdiction. The carriers with regard to which such questions arose were the Union Railroad Company, the Florida East Coast Railway Company, and the Elgin, Joliet & Eastern Railway Company. The Board declined to rule on these jurisdictional questions on the grounds that final determination of the Board's jurisdiction over any particular carrier and any particular group of employees could be made only by the courts and that time did not permit the Board to conduct the special proceedings required for such a determination. Nothing in this Award, however, and no action by the Board, including the reception into evidence of Carriers' Exhibit No. 1 or Employees' Rebuttal Exhibit No. 33, listing certain carriers as parties to the proceeding, is intended to prejudice the position of any carrier or any organization as to these jurisdictional questions.

The Board has incorporated in this Award any matters on which it found the parties were in agreement, has resolved the matters on which the parties were not in agreement, and has given due consideration to those matters on which the parties were in tentative agreement. Further, the Board has given due consideration to the effect of the Award upon adequate and safe transportation service to the public and upon the interests of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

After a full consideration of the evidence and arguments and upon the entire record, the Board makes a complete and final disposition of the issues submitted and finds and awards as follows.

I. Disposition of Section 6 Notices

Those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto are denied, except to the extent hereinafter provided.

II. Use of Firemen (Helpers) On Other Than Steam Power

Part A—Saving Clause

A(1). All agreements, rules, regulations, interpretations, and practices, however established, with respect to the employment of firemen (helpers) shall continue undisturbed except as modified by the terms of this Award.

Part B—Reductions In Jobs

B(1). Within 7 days following the effective date of this Award, each carrier covered by this Award shall have the right to give to each local chairman of the organization representing firemen (helpers) in each fireman (helper) seniority district a list of pool and regularly assigned freight engine crews (including pool and regularly assigned crews used in mixed, miscellaneous, and unclassified services) and a list of regularly assigned yard engine crews (including regularly assigned crews used in transfer, belt line, and miscellaneous yard services) then employed by the carrier in each such seniority district. The two lists shall include those engine crews which, in the carrier's judgment, based upon considerations of safety, undue work burden, and adequate and safe transportation service to the public, do not require the services of a fireman (helper).

B(2). Each local chairman, within 30 days of receipt of the carrier's lists, shall have the right, based upon con-

siderations of safety, undue work burden, and adequate and safe transportation service to the public, to designate the engine crews in which the carrier shall be required to continue to use firemen (helpers); provided that such designated crews shall not be more than 10 per cent of the freight engine crews, nor more than 10 per cent of the yard engine crews, in any seniority district, as such crews are listed by the carrier. Each local chairman's designation of crews to be operated with firemen (helpers), made as provided herein, shall be final and binding upon the parties in interest and shall not be subject to challenge or review; but prior conference shall be had between the parties in interest with respect to the crews to be so designated by the local chairman. The time and place for the beginning of such conferences shall be agreed upon within 10 days after the receipt of the carrier's lists by the local chairman, and said time shall be within 20 days after the receipt of the said lists.

B(3). At 3-month intervals following the date of the carrier's original lists, the carrier shall give to each local chairman lists of pool and regularly assigned freight engine crews and of regularly assigned yard engine crews which have been established or discontinued in each seniority district during the preceding 3 months and which meet the criteria set forth in paragraph B(1) of this Award; and the number of crews designated by the local chairman in which the carrier shall be required to use firemen (helpers) shall thereafter be adjusted, in the manner provided in paragraph B(2) of this Award; provided that not more than 10 per cent of the pool and regularly assigned freight engine crews nor more than 10 per cent of the regularly assigned yard engine crews, then employed by the carrier in any seniority district and included in either list, shall be designated as crews in which firemen (helpers) must be used.

B(4). Copies of all lists herein required to be furnished by the carrier to the local chairman shall be furnished to the general chairman of the organization involved.

B(5). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to use firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services), other than in crews designated by the local chairman, pursuant to the provisions of paragraphs B(2) and B(3) of this Award, except as may be necessary to provide jobs for firemen (helpers) whose employment rights are retained as provided in Parts C and D of this Award; provided that no yard locomotive shall be operated without a fireman (helper) unless and until it is equipped with a deadman control in good operating condition.

PART C—REDUCTIONS IN EMPLOYMENT

C(1). After the expiration of 37 days following the effective date of this Award, the carrier shall not be required to hire firemen (helpers) on other than steam power in any class of freight service (including all mixed, miscellaneous, and unclassified services) or in any class of yard service (including all transfer, belt line, and miscellaneous yard services) unless or until such new hire is needed to man engine crews designated by a local chairman as provided in paragraphs B(2) and B(3) of this Award; and firemen (helpers) that are unneeded to man such designated crews may be separated from the carrier's payrolls and have all of their seniority and employment rights and relations terminated to the extent permitted in the following paragraphs of Part C of this Award.

C(2). Firemen (helpers) hired on or after a date 2 years prior to the effective date of this Award may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated, and in such case shall be entitled to a lump sum separation allowance in an amount to be determined as provided in

Section 9 of the Washington Job Protection Agreement of May 21, 1936.

C(3). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award whose average monthly earnings as firemen (helpers), hostler helpers, hostlers, or engineers have not exceeded $200 during the 24 full calendar months preceding the effective date of this Award, may be separated from the carrier's payrolls and have all of their employment and seniority rights and relations terminated with a severance allowance equal to 100 per cent of their earnings during the preceding 24 calendar months; or may elect to remain on the seniority lists of the carrier with rights to such work as they are qualified to perform, and which may be or become available to them, as provided in Part D of this Award.

C(4). Firemen (helpers) hired prior to a date 2 years prior to the effective date of this Award, who have not performed service as an engineer or as a fireman (helper) since that date, may be separated from the carrier's payrolls as firemen (helpers) and have all of their employment and seniority rights and relations as firemen (helpers) terminated with no severance allowance.

C(5). The provisions of paragraphs C(3) and C(4) of this Award shall not apply to officers or employees of the organizations representing firemen or engineers employed by the carrier, or to supervisory or management officials of the carrier, or to employees on appropriate leaves of absence, or to discharged employees whose cases for reinstatement are pending, providing, if not so situated, they could have met the minimum requirements of service or earnings.

C(6). All other firemen (helpers) with less than 10 years' seniority on the effective date of this Award shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, ex-

cept as modified by and subject to the provisions of Part D of this Award, unless and until offered by the carrier another comparable job (such as, but not limited to, engineer, fireman (helper), brakeman, or clerk in the same or another seniority district) for which they are, or can become, qualified. The offer of another job shall carry with it relocation expenses as provided for and under the conditions set forth in Section 10 of the Washington Job Protection Agreement of May 21, 1936, the continuation of accumulated seniority rights toward such purposes as vacation and other applicable fringe benefits, and guaranteed annual earnings, for a period not exceeding 5 years, equal to the total compensation received by each such employee as fireman (helper), hostler helper, hostler, or engineer during the last 12 months in which compensation was received prior to the date of transfer. Such offers of jobs shall be posted and made available to all qualified firemen (helpers) in order of seniority in the seniority district in which the job offered is located. If, within 7 days after notice is posted, no senior man elects to take such offered job, the most junior man then on the fireman (helper) roster in that seniority district must, within 3 days from receipt of written notice, accept the job or all of his employment and seniority rights and relations shall be terminated and, in that event, he shall be entitled to one-half the severance allowance provided for in paragraph C(3) of this Award. If such junior fireman (helper) shall fail to accept such job and thereby terminates his employment as herein provided, the next most junior fireman (helper) on that same roster must accept the job within 3 days from receipt of written notice or forfeit all of his employment and seniority rights and relations with the allowance provided for above. In each case of refusal to accept such job offer the next most junior fireman (helper) shall be required to accept, as provided for above, or forfeit his employment and seniority rights and relations with, in each case, the allowance provided for above, until there are no

firemen (helpers) with less than 10 years' seniority remaining on the seniority roster for the seniority district in which the job offer is located. Thereafter, the same procedure as is provided above shall be followed in the fireman (helper) seniority district which has its principal extra list for firemen (helpers) closest to the location of the job offered.

C(7). Firemen (helpers) with 10 or more years of seniority as of the effective date of this Award, who are not separated from the carrier's payrolls under the provisions of paragraphs C(3) or C(4) of this Award, shall retain their rights to and obligations to protect engine service assignments as provided by rules in effect on the day preceding the day this Award becomes effective, except as modified by and subject to the provisions of Part D of this Award, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of firemen (helpers) by natural attrition.

PART D—RIGHTS TO WORK

D(1). Firemen (helpers) who elect to remain on the seniority lists of the carrier as provided in paragraph C(3) of this Award shall be entitled to exercise their seniority rights as firemen (helpers) to available employment in engine crews used in passenger service and in freight and yard engine crews designated by the local chairmen in their respective seniority districts as provided in paragraphs B(2) and B(3) of this Award, as hostlers or hostler helpers, and as engineers in any class of service for which they are qualified; but such firemen (helpers) shall have no rights to and shall not claim seniority rights to or employment in any other service.

D(2). Firemen (helpers) who remain on the active working lists of the carrier under the provisions of paragraphs C(6) and C(7) of this Award shall have the right to work their turn as firemen (helpers) to the extent that positions

as firemen (helpers) are available in their respective seniority districts on locomotives of the type to which firemen (helpers) were assigned and in a class of service calling for the service of a fireman (helper) prior to the effective date of this Award; provided, that such firemen (helpers) shall have no right to jobs that the carrier may discontinue pursuant to the provisions of this Award if other employment in any class of engine service, for which they are qualified, is available to them in their respective seniority districts. Such firemen (helpers) will have their seniority rights, existing as of the effective date of this Award, for promotion in their turn, preserved.

D(3). Extra lists shall be adjusted and firemen (helpers) shall be furloughed and recalled pursuant to the provisions of rules in effect as of the day before the day this Award becomes effective, as modified by and subject to the provisions of this Award; provided, that the carrier shall not be required to use firemen (helpers) covered by paragraph D(2) of this Award in freight or yard crews, other than in crews designated by the local chairmen pursuant to the provisions of paragraphs B(2) and B(3), if the services of such employees are required on the extra list to fill vacancies in crews or positions where firemen (helpers) must be used, as in passenger service or under the provisions of this Award.

D(4). Firemen (helpers) retained in service under the conditions set forth in Parts C and D of this Award, when assigned to the extra lists for firemen (helpers), shall not be called to fill vacancies in crews in freight and yard service which have not been designated by the local chairmen pursuant to the provisions of paragraphs B(2) and B(3) of this Award if and when their services are required to fill temporary vacancies as locomotive engineers, or temporary vacancies for firemen (helpers) in passenger service, or temporary vacancies for firemen (helpers) in crews designated by the local chairmen as provided in paragraphs B(2) and B(3) of this Award.

Part E—Continuing Study

E(1). Within 30 days following the effective date of this Award, the parties shall establish a National Joint Board charged with responsibility for making an intensive and continuing study of the experience in road freight and yard service with and without the employment of firemen (helpers) during the period that this Award remains in effect. During the 3-month period before the date this Award is due to expire, the National Joint Board shall prepare and issue to the parties a report based on its study.

E(2). The National Joint Board established in paragraph E(1) shall consist of 4 members, of whom 2 shall be selected by the carriers, and one each by the Brotherhood of Locomotive Firemen and Enginemen, and by the Brotherhood of Locomotive Engineers. The expenses of the Board shall be borne by the participating parties.

III. Consist of Road and Yard Crews (Other Than Engine Service)

Part A—Basic Provisions

A(1). The issue of crew consist (other than engine service) shall be remanded to the local properties for negotiation. Pending the consummation of local agreements disposing of the issue, the following provisions shall govern the use of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, and flagmen) employed in all classes of road service, including all miscellaneous and unclassified services, and the use of brakemen or helpers employed in all classes of yard, transfer, and belt line service, including all miscellaneous yard services.

A(2). No change shall be made in the scope or application of rules in effect immediately prior to the effective date of this Award, whether established by agreement, interpretation, or practice, which require a stipulated num-

ber of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) in any class of road service, including all miscellaneous and unclassified services, or which require a stipulated number of brakemen or helpers in any class of yard, transfer, or belt line service, including all miscellaneous yard services, except by agreement, or pursuant to the provisions of this Award.

A(3). Either party in interest shall give written notice of any proposed change in any such stipulated number of trainmen (assistant conductors, ticket collectors, baggagemen, brakemen, or flagmen) used in any class of road service, including all miscellaneous and unclassified services, in the following categories:

(a) branch lines, including the use of main lines where necessary to reach initial or final terminals of the branch line train; and

(b) road service where existing rule, practice, or interpretation now requires the employment of more or less than 2 trainmen;

and of any proposed change in any such stipulated number of brakemen or helpers used in any class of yard, transfer, or belt line service, including all miscellaneous yard service. The parties in interest, as that term is used in this Award, shall include only the carrier and the organization representing the class or craft of employees holding seniority rights to the position or positions proposed to be abolished or created in the seniority district or districts in which such changes are proposed. The time and place for the beginning of conferences between the representatives of the parties in interest with respect to such proposed change or changes shall be agreed upon within 10 days after the receipt of said notice, and said time shall be within 15 days after the receipt of said notice.

Part B—Review Procedures

B(1). If no agreement is reached between the parties as to the application of the guidelines enumerated in Part C of this Award, the dispute limited to the application of such guidelines as related to the issue involved may be referred by either party to a special board of adjustment.

B(2). Such special board of adjustment shall be chosen in the following manner:

(a) Each party in interest shall name one member within 10 days after notice has been given that the dispute will be referred to such special board of adjustment; and the two partisan members, so chosen, within 10 days after the date of the selection of the second partisan member, shall name the neutral member, who shall be chairman of the board. If the members chosen by the parties shall fail to name the neutral member of the board within 10 days, the National Mediation Board shall be requested to name such member within 5 days after receipt of such request.

(b) If either party fails to name a member of the board within the 10 days provided in paragraph B(2)(a) of this Award, the National Mediation Board shall be requested to name such member in lieu of such party and shall also name the neutral member necessary to constitute a board of 3 members, all within 5 days after the receipt of such request.

B(3). Decisions of the special board of adjustment shall be rendered within 60 days after the apopintment of the neutral member. A decision of the majority of the board shall be binding upon both parties. The parties shall assume the costs and expenses of their respective representatives. The costs and expenses of the neutral member and any incidental expenses shall be shared equally by the parties unless different arrangements can be made by mutual agreement.

Part C—Guidelines

C(1). The special board of adjustment in making its decisions shall be governed by the following general considerations, and, where applicable, particular considerations, although none of these factors alone shall be controlling of the board's decisions.

C(2). General considerations.

(a) Assurance of adequate safety.

(b) Avoidance of unreasonable burden or workload on members of the crew.

(c) Changes in operating conditions, including density of traffic.

(d) Practices regarding the consist of crews in comparable situations where such practices are not in dispute.

(e) Special conditions which exist on any particular assignment.

(f) Duties required in compliance with the carrier's operating rules and instructions applicable to the crew in question.

(g) Physical characteristics of the line to be traversed and in the areas where switching or industrial work is to be performed (including grade and general climatic conditions).

(h) The number of highway, street, road, railroad, or other crossings or intersections to be protected.

(i) State, county, or municipal regulations applicable with respect to highway, street, road, railroad, or other crossings or intersections.

(j) Availability and use of communication equipment (such as, but not limited to, end-to-end train radio, train to way-side radio, and walkie-talkies).

(k) The presence or absence of a fireman in the engine service crew.

C(3). Particular considerations—passenger road service.

(a) The amount of baggage and storage mail to be handled on and off the train at intermediate stations by the train crew.

(b) The number of passenger cars handled in the train and passenger count.

(c) The method of handling passenger transportation (tickets).

(d) The number of passengers boarding and leaving the train at intermediate stations.

(e) Duties required other than the above on any particular assignment.

C(4). Particular considerations—freight service, including miscellaneous and unclassified services.

(a) The amount and nature of work to be performed en route.

(b) The length of train, in context with the amount and nature of work to be performed en route.

(c) Time limitations applicable to the particular assignment.

C(5). Particular considerations—yard, transfer, and belt line service, including all miscellaneous yard services.

(a) The amount and nature of the work to be performed.

(b) Volume of work considered in context with applicable service time limitations.

Part D—Employee Protection

D(1). Road trainmen and yard brakemen or helpers, other than those on furlough on the date that this Award becomes effective, shall be known and designated, for the purposes of this Award, as "protected employees."

D(2). A "protected employee," known and designated as provided in paragraph D(1) of this Award, shall retain his rights to and obligations to protect road and yard service assignments (including all assignments in miscellaneous and unclassified road services and all assignments in transfer, belt line, and miscellaneous yard services) for which he is qualified, as provided by rules in effect on the day preceding the day this Award becomes effective, to the extent that such positions are available to him in his seniority district, unless and until retired, discharged for cause, or otherwise removed from the carrier's active working lists of road trainmen and yard brakemen or helpers by natural attrition; provided, that no such "protected employee" shall have any right to jobs or positions that the carrier may discontinue pursuant to the provisions of this Award if other employment in any such classes of service, for which such employee is qualified, is available to him in his seniority district. If and when the carrier is required to create new jobs or positions for road trainmen or yard brakemen or helpers, pursuant to the provisions of this Award, such positions shall first be filled, to the extent available, by "protected employees" then filling positions which the carriers would otherwise have the right to abolish or eliminate pursuant to the provisions of this Award, before such jobs or positions may be claimed by other employees of the carrier in accordance with their seniority rights.

IV. Duration

This Award shall continue in force for two years from the date it takes effect, unless the parties agree otherwise.

Dated: November 25, 1963

/s/ Benjamin Aaron
Benjamin Aaron
Neutral Member

/s/ James J. Healy
James J. Healy
Neutral Member

/s/ Ralph T. Seward
Ralph T. Seward
Chairman of the Arbitration Board

Concurring:

/s/ Guy W. Knight
Guy W. Knight
Carrier Member

/s/ J. E. Wolfe
J. E. Wolfe
Carrier Member

Dissenting:

H. E. Gilbert
Organization Member

R. H. McDonald
Organization Member

APPENDIX J

STATUTES INVOLVED

Public Law 88-108, 77 Stat. 132:

Whereas the labor dispute between the carriers represented by the Eastern, Western, and Southeastern Carriers' Conference Committees and certain of their employees represented by the Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Order of Railway Conductors and Brakemen, Brotherhood of Railroad Trainmen, and the Switchmen's Union of North America, labor organizations, threatens essential transportation services of the Nation; and

Whereas it is essential to the national interest, including the national health and defense, that essential transportation services be maintained; and

Whereas all the procedures for resolving such dispute provided for in the Railway Labor Act have been exhausted and have not resulted in settlement of the dispute; and

Whereas the Congress finds that emergency measures are essential to security and continuity of transportation services by such carriers; and

Whereas it is desirable to achieve the above objectives in a manner which preserves and prefers solutions reached through collective bargaining; and

Whereas, on August 2, 1963, the Secretary of Labor submitted to the carrier and organization representatives certain suggestions as a basis of negotiation for disposition of the firemen (helper) and crew consist issues in the dispute and thereupon through such negotiations tentative agreement was reached with respect to portions of such suggestions; and

Whereas, on August 16, 1963, the carrier parties to the dispute accepted and the organization parties to the dis-

pute accepted with certain reservations the Secretary of Labor's suggestion that the fireman (helper) and crew consist issues be resolved by binding arbitration but the said parties have been unable to agree upon the terms and procedures of an arbitration agreement: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That no carrier which served the notices of November 2, 1959, and no labor organization which received such notices or served the labor organization notices of September 7, 1960, shall make any change except by agreement, or pursuant to an arbitration award as hereinafter provided, in rates of pay, rules, or working conditions encompassed by any such notices, or engage in any strike or lockout over any dispute arising from any of such notices. Any action heretofore taken which would be prohibited by the foregoing sentence shall be forthwith rescinded and the status existing immediately prior to such action restored.

SEC. 2. There is hereby established an arbitration board to consist of seven members. The representatives of the carrier and organization parties to the aforesaid dispute are hereby directed, respectively, within five days after the enactment hereof each to name two persons to serve as members of such arbitration board. The four members thus chosen shall select three additional members. The seven members shall then elect a chairman. If the members chosen by the parties shall fail to name one or more of the additional three members within ten days, such additional members shall be named by the President. If either party fails to name a member or members to the arbitration board within the five days provided, the President shall name such member or members in lieu of such party and shall also name the additional three members necessary to constitute a board of seven members, all within ten days after the date of enactment of this joint resolution. Not-

withstanding any other provision of law, the National Mediation Board is authorized and directed: (1) to compensate the arbitrators not named by the parties at a rate not in excess of $100 for each day together with necessary travel and subsistence expenses, and (2) to provide such services and facilities as may be necessary and appropriate in carrying out the purposes of this joint resolution.

SEC. 3. Promptly upon the completion of the naming of the arbitration board the Secretary of Labor shall furnish to the board and to the parties to the dispute copies of his statement to the parties of August 2, 1963, and the papers therewith submitted to the parties, together with memorandums and such other data as the board may request setting forth the matters with respect to which the parties were in tentative agreement and the extent of disagreement with respect to matters on which the parties were not in tentative agreement. The arbitration board shall make a decision, pursuant to the procedures hereinafter set forth, as to what disposition shall be made of those portions of the carriers' notices of November 2, 1959, identified as "Use of Firemen (Helpers) on Other Than Steam Power" and "Consist of Road and Yard Crews" and that portion of the organizations' notices of September 7, 1960, identified as "Minimum Safe Crew Consist" and implementing proposals pertaining thereto. The arbitration board shall incorporate in such decision any matters on which it finds the parties were in agreement, shall resolve the matters on which the parties were not in agreement, and shall, in making its award, give due consideration to those matters on which the parties were in tentative agreement. Such award shall be binding on both the carrier and organization parties to the dispute and shall constitute a complete and final disposition of the aforesaid issues covered by the decision of the board of arbitration.

SEC. 4. To the extent not inconsistent with this joint resolution the arbitration shall be conducted pursuant to sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to section 9 of said Act. The United States District Court for the District of Columbia is hereby designated as the court in which the award is to be filed, and the arbitration board shall report to the National Mediation Board in the same manner as arbitration boards functioning pursuant to the Railway Labor Act. The award shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years from the date the award takes effect, unless the parties agree otherwise.

SEC. 5. The arbitration board shall begin its hearings thirty days after the enactment of this joint resolution or on such earlier date as the parties to the dispute and the board may agree upon and shall make and file its award not later than ninety days after the enactment of this joint resolution: *Provided, however,* That said award shall not become effective until sixty days after the filing of the award.

SEC. 6. The parties to the disputes arising from the aforesaid notices shall immediately resume collective bargaining with respect to all issues raised in the notices of November 2, 1959, and September 7, 1960, not to be disposed of by arbitration under section 3 of this joint resolution and shall exert every reasonable effort to resolve such issues by agreement. The Secretary of Labor and the National Mediation Board are hereby directed to give all reasonable assistance to the parties and to engage in mediatory action directed toward promoting such agreement.

SEC. 7. (a) In making any award under this joint resolution the arbitration board established under section 2 shall give due consideration to the effect of the proposed award upon adequate and safe transportation service to the public

and upon the interets of the carrier and employees affected, giving due consideration to the narrowing of the areas of disagreement which has been accomplished in bargaining and mediation.

(b) The obligations imposed by this joint resolution, upon suit by the Attorney General, shall be enforcible through such orders as may be necessary by any court of the United States having jurisdiction of any of the parties.

SEC. 8. This joint resolution shall expire one hundred and eighty days after the date of its enactment, except that it shall remain in effect with respect to the last sentence of section 4 for the period prescribed in that sentence.

SEC. 9. If any provision of this joint resolution or the application thereof is held invalid, the remainder of this joint resolution and the application of such provision to other parties or in other circumstances not held invalid shall not be affected thereby.

Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 151, et seq.

* * *

FUNCTIONS OF MEDIATION BOARD

SECTION 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * *

SECTION 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed

after termination of conferences without request for or proffer of the services of the Mediation Board.

ARBITRATION

SEC. 7. First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the parties or by the appropriate adjustment board or through mediation, in the manner provided in the preceding sections, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.

Second. Such board of arbitration shall be chosen in the following manner:

(a) In the case of a board of three, the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name one arbitrator; the two arbitrators thus chosen shall select a third arbitrator. If the arbitrators chosen by the parties shall fail to name the third arbitrator within five days after their first meeting, such third arbitrator shall be named by the Mediation Board.

(b) In the case of a board of six, the carrier or carriers and the representatives of the employees, parties respectively to the agreement to arbitrate, shall each name two arbitrators; the four arbitrators thus chosen shall, by a majority vote, select the remaining two arbitrators. If the arbitrators chosen by the parties shall fail to name the two arbitrators within fifteen days after their first meeting, the said two arbitrators, or as many of them as have not been named, shall be named by the Mediation Board.

Third. (a) When the arbitrators selected by the respective parties have agreed upon the remaining arbitrator or arbitrators, they shall notify the Mediation Board, and, in the event of their failure to agree upon any or upon all of the necessary arbitrators within the period fixed by this Act, they shall, at the expiration of such period, notify the Mediation Board of the arbitrators selected, if any, or of their failure to make or complete such selection.

(b) The board of arbitration shall organize and select its own chairman and make all necessary rules for conducting its hearings: *Provided, however*, That the board of arbitration shall be bound to give the parties to the controversy a full and fair hearing, which shall include an opportunity to present evidence in support of their claims, and an opportunity to present their case in person, by counsel, or by other representatives as they may respectively elect.

(c) Upon notice from the Mediation Board that the parties, or either party, to an arbitration desire the reconvening of the board of arbitration (or a subcommittee of such board of arbitration appointed for such purpose pursuant to the agreement to arbitrate) to pass upon any controversy over the meaning or application of their award, the board, or its subcommittee, shall at once reconvene. No question other than, or in addition to, the questions relating to the meaning or application of the award, submitted by the party or parties in writing, shall be considered by the reconvened board of arbitration or its subcommittee.

Such rulings shall be acknowledged by such board or subcommittee thereof in the same manner, and filed in the same district court clerk's office, as the original award and become a part thereof.

(d) No arbitrator, except those chosen by the Mediation Board, shall be incompetent to act as an arbitrator because

of his interest in the controversy to be arbitrated, or because of his connection with or partiality to either of the parties to the arbitration.

(e) Each member of any board of arbitration created under the provisions of this Act named by either party to the arbitration shall be compensated by the party naming him. Each arbitrator selected by the arbitrators or named by the Mediation Board shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, while serving as an arbitrator.

(f) The board of arbitration shall furnish a certified copy of its award to the respective parties to the controversy, and shall transmit the original, together with the papers and proceedings and a transcript of the evidence taken at the hearings, certified under the hands of at least a majority of the arbitrators, to the clerk of the district court of the United States for the district wherein the controversy arose or the arbitration is entered into, to be filed in said clerk's office as hereinafter provided. The said board shall also furnish a certified copy of its award, and the papers and proceedings, including testimony relating thereto, to the Mediation Board, to be filed in its office; and in addition a certified copy of its award shall be filed in the office of the Intertsate Commerce Commission: *Provided, however,* That such award shall not be construed to diminish or extinguish any of the powers or duties of the Interstate Commerce Commission, under the Interstate Commerce Act, as amended.

(g) A board of arbitration may, subject to the approval of the Mediation Board, employ and fix the compensation of such assistants as it deems necessary in carrying on the arbitration proceedings. The compensation of such employees, together with their necessary traveling expenses and expenses actually incurred for subsistence, while so

employed, and the necessary expenses of boards of arbitration, shall be paid by the Mediation Board.

Whenever practicable, the board shall be supplied with suitable quarters in any Federal building located at its place of meeting or at any place where the board may conduct its proceedings or deliberations.

(h) All testimony before said board shall be given under oath or affirmation, and any member of the board shall have the power to administer oaths or affirmations. The board of arbitration, or any member thereof, shall have the power to require the attendance of witnesses and the production of such books, papers, contracts, agreements, and documents as may be deemed by the board of arbitration material to a just determination of the matters submitted to its arbitration, and may for that purpose request the clerk of the district court of the United States for the district wherein said arbitration is being conducted to issue the necessary subpoenas, and upon such request the said clerk or his duly authorized deputy shall be, and he hereby is, authorized, and it shall be his duty, to issue such subpoenas. In the event of the failure of any person to comply with such subpoena, or in the event of the contumacy of any witness appearing before the board of arbitration, the board may invoke the aid of the United States courts to compel witnesses to attend and testify and to produce such books, papers, contracts, agreements, and documents to the same extent and under the same conditions and penalties as provided for in the Act to regulate commerce approved February 4, 1887, and the amendments thereto.

Any witness appearing before a board of arbitration shall receive the same fees and mileage as witnesses in courts of the United States, to be paid by the party securing the subpoena.

SEC. 8. The agreement to arbitrate—

(a) Shall be in writing;

(b) Shall stipulate that the arbitration is had under the provisions of this Act;

(c) Shall state whether the board of arbitration is to consist of three or six members;

(d) Shall be signed by the duly accredited representatives of the carrier or carriers and the employees, parties respectively to the agreement to arbitrate, and shall be acknowledged by said parties before a notary public, the clerk of a district court or circuit court of appeals of the United States, or before a member of the Mediation Board, and, when so acknowledged, shall be filed in the office of the Mediation Board;

(e) Shall state specifically the questions to be submitted to the said board for decision; and that, in its award or awards, the said board shall confine itself strictly to decisions as to the questions so specifically submitted to it;

(f) Shall provide that the questions, or any one or more of them, submitted by the parties to the board of arbitration may be withdrawn from arbitration on notice to that effect signed by the duly accredited representatives of all the parties and served on the board of arbitration;

(g) Shall stipulate that the signatures of a majority of said board of arbitration affixed to their award shall be competent to constitute a valid and binding award;

(h) Shall fix a period from the date of the appointment of the arbitrator or arbitrators necessary to complete the board (as provided for in the agreement) within which the said board shall commence its hearings;

(i) Shall fix a period from the beginning of the hearings within which the said board shall make and file its award:

Provided, That the parties may agree at any time upon an extension of this period;

(j) Shall provide for the date from which the award shall become effective and shall fix the period during which the award shall continue in force;

(k) Shall provide that the award of the board of arbitration and the evidence of the proceedings before the board relating thereto, when certified under the hands of at least a majority of the arbitrators, shall be filed in the clerk's office of the district court of the United States for the district wherein the controversy arose or the arbitration was entered into, which district shall be designated in the agreement; and, when so filed, such award and proceedings shall constitute the full and complete record of the arbitration;

(l) Shall provide that the award, when so filed, shall be final and conclusive upon the parties as to the facts determined by said award and as to the merits of the controversy decided;

(m) Shall provide that any difference arising as to the meaning, or the application of the provisions, of an award made by a board of arbitration shall be referred back for a ruling to the same board, or, by agreement, to a subcommittee of such board; and that such ruling, when acknowledged in the same manner, and filed in the same district court clerk's office, as the original award, shall be a part of and shall have the same force and effect as such original award; and

(n) Shall provide that the respective parties to the award will each faithfully execute the same.

The said agreement to arbitrate, when properly signed and acknowledged as herein provided, shall not be revoked by a party to such agreement: *Provided however,* That such agreement to arbitrate may at any time be revoked and canceled by the written agreement of both parties, signed by

their duly accredited representatives, and (if no board of arbitration has yet been constituted under the agreement) delivered to the Mediation Board or any member thereof; or, if the board of arbitration has been constituted as provided by this Act, delivered to such board of arbitration.

SEC. 9. First. The award of a board of arbitration, having been acknowledged as herein provided, shall be filed in the clerk's office of the district court designated in the agreement to arbitrate.

Second. An award acknowledged and filed as herein provided shall be conclusive on the parties as to the merits and facts of the controversy submitted to arbitration, and unless, within ten days after the filing of the award, a petition to impeach the award, on the grounds hereinafter set forth, shall be filed in the clerk's office of the court in which the award has been filed, the court shall enter judgment on the award, which judgment shall be final and conclusive on the parties.

Third. Such petition for the impeachment or contesting of any award so filed shall be entertained by the court only on one or more of the following grounds:

(a) That the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act;

(b) That the award does not conform, nor confine itself, to the stipulations of the agreement to arbitrate; or

(c) That a member of the board of arbitration rendering the award was guilty of fraud or corruption; or that a party to the arbitration practiced fraud or corruption which fraud or corruption affected the result of the arbitration: *Provided, however,* That no court shall entertain any such petition on the ground that an award is invalid for uncertainty; in such case the proper remedy shall be a submission of such award to a reconvened board,

or subcommittee thereof, for interpretation, as provided by this Act: *Provided further,* That an award contested as herein provided shall be construed liberally by the court, with a view to favoring its validity, and that no award shall be set aside for trivial irregularity or clerical error, going only to form and not to substance.

Fourth. If the court shall determine that a part of the award is invalid on some ground or grounds designated in this section as a ground of invalidity, but shall determine that a part of the award is valid, the court shall set aside the entire award: *Provided, however,* That, if the parties shall agree thereto, and if such valid and invalid parts are separable, the court shall set aside the invalid part, and order judgment to stand as to the valid part.

Fifth. At the expiration of ten days from the decision of the district court upon the petition filed as a foresaid, final judgment shall be entered in accordance with said decision, unless during said ten days either party shall appeal therefrom to the circuit court of appeals. In such case only such portion of the record shall be transmitted to the appellate court as is necessary to the proper understanding and consideration of the questions of law presented by said petition and to be decided.

Sixth. The determination of said circuit court of appeals upon said questions shall be final, and being certified by the clerk thereof to said district court, judgment pursuant thereto shall thereupon be entered by said district court.

Seventh. If the petitioner's contentions are finally sustained, judgment shall be entered setting aside the award in whole or, if the parties so agree, in part; but in such case the parties may agree upon a judgment to be entered disposing of the subject matter of the controversy, which judgment when entered shall have the same force and effect as judgment entered upon an award.

Eighth. Nothing in this Act shall be a construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor or service by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

* * *

Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 101 et seq.

SECTION 1. No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

* * *

SECTION 4. No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any

strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

• • •

SECTION 7. No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the

threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complaintant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a

reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

SECTION 8. No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

SECTION 9. No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 861

BROTHERHOOD OF RAILROAD TRAINMEN, SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners.*

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, *et al., Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS CONCERNING PETITION FOR WRIT OF CERTIORARI

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Opinions Below

The opinions of the District Court (Appendices A, B and D to Petition) are reported at 250 F. Supp. 691, 252 F. Supp. 207 and 254 F. Supp. 306. The opinions of the Court of Appeals (Appendices E and F to Petition), not yet officially reported, are unofficially reported at 55 CCH Labor Cases ¶ 11,912 and 56 CCH Labor Cases ¶ 12,095.

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Questions Presented

1. Upon the expiration of the two-year period in which the Award by Arbitration Board No. 282 "shall continue in force" and in the absence of agreement by the parties as to what crew-consist rules shall apply thereafter, do the modifications which were made in the crew-consist agreements and rules in effect prior to Award 282 by awards of special boards of adjustment or by agreements, pursuant to procedures established by Award 282, continue to apply until changed in accordance with the Railway Labor Act, or do the prior crew-consist agreements and rules automatically revive and apply thereafter until changed in accordance with the Railway Labor Act?

2. With respect to ten of the agreements entered into pursuant to the Award (described in Section F of the Stipulation as to Facts), should they have been construed by the courts below as expressly providing that the prior agreements and rules were to be restored upon the expiration of the Award?

3. Was the last day of the two-year period in which Award 282 "shall continue in force" January 24, 1966 or January 25, 1966?

4. Did the Brotherhood of Railroad Trainmen and the Richmond, Fredericksburg & Potomac Railroad Company enter into an agreement pursuant to procedures established by Award 282?

Statement of the Case

Respondents herein are the petitioners in No. 863, which relates to the same judgment and proceeding below. We respectfully refer the Court to the Statement of the Case in that petition for a more adequate and accurate general description of the relevant facts than is contained in the instant petition. Certain additional facts relevant to the contentions made by petitioners herein are set forth in our Argument.

Argument

The parties stipulated, for purposes of this case, that 83 awards by special boards of adjustment and 92 agreements were brought about during the two-year period of Award 282 pursuant to the procedures for modifying prior crew-consist agreements and rules established by that Award (JA 62-70).[1] Of those 92 agreements, the parties agreed (JA 65) that 43 provided that "they shall continue in effect until changed in accordance with the provisions of the Railway Labor Act," and petitioners have not disputed the fact that those agreements do so continue to apply (JA 23). The parties also agreed that 20 of the agreements pursuant to the Award provide that they "shall continue in effect to the same extent as if they were awards rendered by special boards of adjustment" (JA 65), that 3 provide that they shall continue in effect unless the unions' contention that the prior rules and agreements are automatically revived "is sustained" (JA 65-66), and that 12 "do not contain any provision concerning the period during which the agreement shall continue in force" (JA 66).

In Section F of the Stipulation as to Facts (JA 66-70), the parties described 13 agreements "which either do not come within any of the categories listed above or the parties hereto have been unable to agree upon placing such an agreement in one of the categories listed above" (JA 66). Of those 13, the trial court found (Pet., App. B, at 21a) that three of them expressly provided for restoration of the prior agreements and rules upon the expiration of Award 282. The carriers did not appeal that holding and those three agreements are not in dispute. Finally, an agreement between the Brotherhood of Railroad Trainmen and the Richmond, Fredericksburg & Potomac Railroad Company was embodied in an exchange of correspondence which is

[1] JA references are to the Joint Appendix in No. 20152 below.

set forth in Section G of the Stipulation and the attachments thereto (JA 70, 80-90).

Hence, the basic dispute as to what rules the Congress intended to be applied following the expiration of Award 282 relates to the 83 special board awards and to 46 of the agreements pursuant to Award 282. While we believe that petitioners' contentions in that regard are erroneous, we do not object to a grant of this petition insofar as it raises that issue if the petition in No. 863 also is granted. Petitioners also seek to raise additional issues, involving an interpretation of the language of a particular agreement or other special circumstances, with respect to the 10 disputed agreements described in Section F of the Stipulation, with respect to the agreement with the Richmond, Fredericksburg & Potomac Railroad Company, and with respect to one special board award. We oppose the grant of this petition insofar as it relates to those issues. Our reasons for these positions are set forth below.

1. In the petition filed in No. 863 (pp. 12-27), the carriers demonstrate that the Congress intended the Railway Labor Act to govern the situation following the expiration of Award ; while the Court of Appeals (as well as the District Court) agreed with that premise, it fell into error in certain of its interpretations of the Railway Labor Act. In the instant petition (pp. 10-14), the petitioner unions contend that the Congress intended, regardless of the Railway Labor Act, that the prior agreements and rules governing the consist of train crews were to be automatically restored to full effect upon the expiration of the Award, unless the parties expressly agreed otherwise. We believe that the unions' position in this regard is without foundation in P.L. 88-108, in its legislative history, in the Railway Labor Act and in reason, as well as having been rejected by both courts below. We recognize, however, that the Court prob-

ably will not attempt to determine who is right and who is wrong as to that issue upon the basis of the petitions and the responses thereto, as such matters normally are determined only after full briefing and argument. Since we are convinced that the petition in No. 863 presents important issues which should be reviewed by this Court, and in view of the considerations stated above, we do not oppose the grant of the instant petition insofar as it relates to the general issue of what the Congress intended with respect to the situation following the expiration of Award 282, if the petition in No. 863 is granted. That is the issue sought to be stated in Question No. 1 presented (pp. 2-3) in the instant petition, which we have restated as Question No. 1 herein (p. 2, *supra*).

We emphasize, however, our view that there is no support for petitioners' contention that the prior agreements and rules governing the consist of train crews were intended to be restored automatically upon expiration of the Award, unless the parties expressly agreed otherwise. Petitioners rely (Pet., at 11) upon the fact that the Award, under its own terms and as required by P.L. 88-108, expired after two years. But that fact merely poses the issue as to what rules are to govern the consist of train crews after the expiration of the Award; it does not provide the answer to that issue.

Petitioners also state (Pet., at 11) that they cited to the lower courts legislative history of P.L. 88-108, "all to the effect that the work rules created pursuant to the legislation would continue in effect only for a two-year period at the most." That legislative history is not cited or set out in the petition. Insofar as we are aware, no one stated at any time during the consideration by the Congress of P.L. 88-108 either that the modifications in the prior agreements and rules made by or pursuant to Award 282 would have no effect after the expiration of the Award or that such prior

agreements and rules would be restored upon the expiration of the Award.

As we show in the petition filed in No. 863 (at pp. 12-16), the Administration proposed interim regulation by the Interstate Commerce Commission of the issues raised by the 1959 and 1960 Section 6 notices while the parties continued bargaining upon those notices which would remain outstanding. Even under that proposed legislation, the prior agreements and rules would not have to be restored to full effect upon the expiration of the I.C.C. regulations. Rather, if no agreement was reached disposing of the Section 6 notices and in the absence of further legislation, the carriers would have been free to implement their Section 6 notices so as to change the consist of train crews at their discretion and the unions would have been free to strike.

For example, Secretary of Labor Wirtz testified, in response to questions during the committee hearings upon the Administration's bill, as follows:

> "Senator McGee. What happens, again for the record, to an interim rule that expires without any negotiated rule having been made during the 2-year life?
>
> "Secretary Wirtz. And no renewal of the resolution?
>
> "Senator McGee. Yes.
>
> "Secretary Wirtz. It would mean that section 6 notices now in effect would still be standing and that there would be a right of either party to take whatever course of action it wanted at that time." Hearings on S.J. Res. 102 before the Senate Committee on Commerce, 88th Cong., 1st Sess., at 81.

> "Mr. Devine. I think I know the answers to this, but I think it should be made clear in the record. Say all of the gymnastics provided in this bill are gone through and the procedures are followed and the Interstate Commerce Commission makes recommendations,

and let us say the brotherhoods in this instance would not agree to go along with the recommendations. Would they then be free to strike?

"Secretary Wirtz. After the interim rule had been in effect for the 2-year period, then assuming there is no agreement, the situation would be that they would be at that point unless there was further action taken by the Congress." Hearings on H.J. Res. 565 before the House Committee on Interstate and Foreign Commerce, 88th Cong., 1st Sess., at 107.

Secretary Wirtz also agreed that there was "a strong likelihood the President would recommend an extension" of the legislation if the dispute was not settled during the two-year period of I.C.C. regulation, and stated that consideration would be given to calling "a special session of the Congress" if the Congress was not in regular session at that time. Hearings on S.J. Res. 102, *supra* at 55-56, 61. Thus, the President of the Brotherhood of Railroad Trainmen, Mr. Charles Luna, believed that any rules imposed by the I.C.C. would in effect become permanent. He testified that after the end of the two-year period "we would be back here with it" and "[w]e would be stuck with them unless we did settle for them" by agreement. Hearings on H.J. Res. 565, *supra* at 904. The President of the Switchmen's Union of North America, Mr. Neil P. Speirs, agreed. Hearings on S.J. Res. 102, *supra* at 580.

The only interpretation of the Administration's bill contrary to that of Secretary Wirtz was given by counsel for one of the other unions, who thought that the I.C.C. rules would remain in effect after the two-year period but would then be subject to change under the Railway Labor Act. Hearings on H.J. Res. 565, *supra* at 682. No one suggested that the prior agreements and rules would have to be automatically restored, as petitioners now contend, either under

the Administration's bill or under P.L. 88-108 as eventually enacted.

In the petition filed as No. 863 (pp. 12-27), we have demonstrated that the Congress rejected the Administration's bill and adopted the arbitration provisions of the Railway Labor Act so as to bring about a "complete and final disposition" of the 1959 and 1960 Section 6 notices. In so doing, the Congress intended that the expiration of Award 282 should have the same effect as the expiration of any other collective bargaining agreement or arbitration award under that Act. Under that Act, the rights and duties of the parties to such an agreement or award are not changed by the expiration of the agreement or award, but continue until changed pursuant to new Section 6 notices in accordance with the Act. The purpose and effect of an expiration date in the agreement or award is to permit the parties thereafter to proceed under the Act with bargaining upon new Section 6 notices proposing changes, rather than to restore the situation in effect prior to such agreement or award.

Petitioners' final reliance with respect to this issue (Pet., at 11-12) is a statement in the opinion of this Court in *Engineers* v. *Chicago, R. I. & P. R. Co.*, 382 U.S. 423, 433 (1966), to the effect that the Award "was to be a complete and final disposition of these issues for a period not exceeding two years from the date the award would take effect. . . ." No one contends otherwise. The carriers agree that the modifications in the prior rules and agreements made by or pursuant to the Award are subject to change following expiration of the Award, pursuant to valid Section 6 notices proposing such changes and otherwise in accordance with the Railway Labor Act. The judgment entered by the trial court, affirmed in this regard by the Court of Appeals, expressly so provides (JA 176-178). We note, however, that the only issue decided by

this Court in that case is that P.L. 88-108 and Award 282 did not pre-empt so-called "full crew" laws, and the Court did not in any way purport to decide what agreements and rules were to be in effect following the expiration of Award 282.

2. Petitioners make a further argument with respect to the 10 disputed agreements pursuant to Award 282 which are described in Section F of the Stipulation as to Facts. That argument (Pet., at 14-18), in essence, is that the courts below erred in refusing to construe those agreements as expressly providing for restoration of the prior agreements and rules upon the expiration of Award 282. The trial court found (Pet., App. B, at 19a) that:

> "It is clear that all of these agreements were adjusted to the duration of the effective period of Award 282, they were made in contemplation of that Award, and the reasonable construction of these agreements, in the opinion of the Court, is that they have the same effect as awards of Special Boards of Adjustment created under the Award, and the same consequences attach, namely, that a new status is created which cannot be changed except in the manner already discussed [*i.e.*, in accordance with the Railway Labor Act]."

The Court of Appeals affirmed "both the reasoning and result reached by the District Court in construing" those agreements (Pet., App. F, at 90a, fn. 6).[2]

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[2] In so doing, the Court of Appeals expressly referred only to "the agreements entered into between the BRT and the Kansas City Southern Railway and Louisiana & Arkansas Railway, and the Wichita Terminal Association." Apparently, this was because it was only with respect to those two agreements that the issue was seriously pressed by petitioners. In the petition (p. 16), the first such agreement is the only one as to which specific language is relied upon. While that agreement provides

We believe that the courts below correctly construed the agreements in question, but even if it were possible to construe one or more of them in the manner contended for by petitioners, in our view this is not the kind of issue which this Court should concern itself with. No issues of general importance are involved, but simply the proper construction to be given to particular language in ten separate agreements between a union and a carrier. It was the presence of such relatively minor issues which primarily led each of the courts below to render more than one opinion (see Pet., at 13).[3] They necessarily would complicate the briefing, argument and decision of the case in this Court if the Court should review those issues as well as the more important issues presented in No. 863 and in that part of the instant petition discussed at pp. 4-9, *supra*. We note that if the Court should agree

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that it "does not affect schedule rules, agreements, (and practices with respect to consist of crews), in effect on the day preceding the effective date of this agreement," except as modified by the agreement and the Award, for the period thereof, it also provides that the "agreement . . . shall remain in effect until January 25, 1966, unless the parties agree otherwise, in accordance with Article IV, Duration of the Award of Arbitration Board No. 282" (JA 68). Hence, the parties expressly tied the duration of the agreement into the duration of Award 282, so that the situation after January 25, 1966 was made dependent upon the resolution of the basic issue as to the effect of the expiration of the Award. So, too, in the agreement with the Wichita Terminal Association (JA 69-70), the parties "recognize[d] that this Carrier and the Brotherhood of Railroad Trainmen are parties to Award of Board of Arbitration No. 282 and will be subject to whatever disposition is made of the Crew Consist issue nationally at the expiration of . . . the effective period of Award No. 282."

[3] We note that the Memorandum and Order entered by the court below on September 21, 1967 (incorrectly described by petitioner as a "third opinion") and subsequent occurrences with respect thereto, referred to on pp. 13-14 of the petition, did not relate to this case. The Memorandum and Order was entered in the case (Dockets No. 20191, 20192, 20125 and 20216) relating to the expiration of the firemen's provisions of the Award, and was in response to a petition for rehearing filed only in that case. It has nothing to do with any issue involved in this case. See Pet., App. H, at 92a-94a, and the petition for writ of certiorari filed in No. 933, at pp. 11-14, 27-36.

with petitioners' basic contention that the Congress intended the prior agreements and rules to be automatically revived upon expiration of the Award, such a holding would apply to the ten agreements in question so as to obviate the issue as to how those agreements should be interpreted. Hence, we submit that the petition should be denied insofar as it relates to the interpretation of those agreements, which issue is the one purportedly presented by Question No. 2 in the petition (p. 3), but which we believe is more accurately stated in Question No. 2 on page 2 of this brief.

3. The courts below held that the last day of the two-year period of the crew-consist provisions of Award 282 was January 25, 1966. Petitioners contend (Pet., at 18-21) that the last day was January 24, 1966. As petitioners indicate, the only practical significance of this issue concerns a single award by a special board of adjustment, which award was rendered on January 25, 1966. In view of the holding by the Court of Appeals that the procedures established by Award 282 could not validly be initiated or completed after the expiration of the Award (Pet., App. F, at 76a-77a), that special board award would have been held to be invalid if the Court of Appeals has also concluded that January 24, 1966 was the last day of Award 282. As we show in the petition in No. 863 (pp. 16-23), however, the Court of Appeals erred in holding that the procedures established by the Award could not be initiated or completed after expiration of the Award. If so, this issue as to whether January 24 or January 25, 1966 was the last day of the Award has no pratical significance.

In any event, that issue is not one which deserves review by this Court. It has no general importance with respect either to the situation following the expiration of the Award or with respect to any broad principle of law, and

is one of the minor issues which would unduly complicate a review of the case by this Court. Moreover, the decision below is correct.

As the Court of Appeals pointed out (Pet., App. F, at 85a-86a), any doubt about the matter should appropriately be resolved in favor of an interpretation which sustains the validity of the special board award and the conclusion of the special board that it was authorized to render that award on January 25, 1966.[4] But however that may be, in our opinion there is no basis for reasonable doubt about the fact that the last day of the Award was January 25, 1966. Certainly, the parties had no doubt about that fact at the time. Only a few days prior to January 25, 1966, the Brotherhood of Railroad Trainmen (the union involved in the special board award rendered on that date) sent a letter to the carriers in which it stated that Award 282 expired "at 12:01 AM, January 26, 1966" (JA 10, 23, 141), and that union requested that the proposals in its 1965 Section 6 notices be made "[e]ffective January 26, 1966" (JA 116-117). Respondents alleged in their complaint that "the Award ceases to continue in force as an award . . . after January 25, 1966" (JA 9), and petitioners admitted in their answer "that the Award of Arbitration Board No. 282 ceased to exist after January 25, 1966" (JA 22). The proceedings in the trial court were conducted throughout on that basis, including the Stipulation as to Facts entered into by the parties which listed the special board award in question among those made during the period of the Award (Section A, JA 62-65) rather than in the Section (I, JA 70-75) giving detailed facts concerning the special board awards rendered (or

[4] With respect to the statement that the "third opinion" of the Court of Appeals shows its uncertainty" (Pet., at 20) with respect to this issue, that so-called "third opinion" was rendered in another case and did not involve this case or this issue. See fn. 3, at p. 10, *supra*.

as to which proceedings before a special board of adjustment were still pending) after the expiration of Award 282.

Petitioners first raised the contention that January 24, 1966 was the last day of Award 282 during a hearing on the form of the judgment to be entered by the trial court following its opinions deciding the issues presented (JA 150-151). In view of the circumstances related above, we submit that the trial judge was fully justified in rejecting that belated contention because January 25, 1966 was "the date always used" by everyone concerned until after he had made his rulings based thereon (JA 151). Even if the crew-consist provisions of Award 282 otherwise would have expired on January 24, 1966, the common understanding by the unions and the carriers that this would not occur until the end of January 25, 1966 would constitute an extension of the Award by agreement, as is expressly permitted by Section 4 of P.L. 88-108 and Article IV of Award 282.

That common understanding accords, furthermore, with established law. The effective date of the crew-consist provisions of Award 282 was January 25, 1964. Section 4 of P.L. 88-108 provided that the Award "shall continue in force for such period as the arbitration board shall determine in its award, but not to exceed two years *from* the date the award takes effect, unless the parties agree otherwise" (emphasis added). Article IV of Award 282 provided that it "shall continue in force for two years *from* the date it takes effect, unless the parties agree otherwise" (emphasis added). In *Sheets* v. *Selden's Lessee*, 2 Wall. (69 U.S.) 177, 190 (1864), this Court stated that: "The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed *from* a particular day or a particular event . . ., is to exclude the day thus designated, and to include the

last day of the specified period" (emphasis added). This continues to be the rule in the federal courts. *E.g.*, Rule 6(a) F.R. Civ. P.; *Burnet* v. *Willingham L. & T. Co.*, 282 U.S. 437, 439-440 (1931); cf., *Union National Bank* v. *Lamb*, 337 U.S. 38, 40-41 (1949).

We submit, therefore, that the Court should deny the petition insofar as it relates to the issue of whether January 24 or January 25, 1966 was the last day of Award 282. That issue is stated as Question No. 3 in the petition (p. 3), and as Question No. 3 herein (p. 2, *supra*).

4. The final issue raised in the petition (pp. 22-24) concerns the agreement entered into by the Brotherhood of Railroad Trainmen and the Richmond, Fredericksburg & Potomac Railroad Company, pursuant to Award 282. Petitioners now contend that there was no such agreement. But they stipulated for purposes of the case (JA 70) that "the BRT agreed" that the carrier "could make certain changes in crew consist, pursuant to Section III of the Award. . . ." In the District Court, petitioners argued that "the only consensual arrangement agreed to by BRT was that the carrier could operate with crews smaller than prescribed in pre-existing rules 'until January 25, 1966.'" Pre-Trial Memorandum on Behalf of Brotherhood of Railroad Trainmen and Switchmen's Union of North America, at 10. By the time the case reached the Court of Appeals, petitioners thought it "doubtful that there was any agreement at all." Brief for Appellants in No. 20152, at 39. The Court of Appeals did not share those doubts (Pet., App. F, at 90a, fn. 6), and understandably so in view of the stipulation entered into by the parties. Nevertheless, petitioners now have come full circle and flatly urge that no agreement was made.

The fact of the matter is that the parties did agree, as

is shown by the stipulation and attached correspondence (JA 70, 80-90), and that agreement was implemented as of November 15, 1964 and has been applied ever since. They were in dispute as to what the effect of the expiration of Award 282 would have upon the agreement—the dispute which constitutes the fundamental issue in this case. The holding by both courts below that the rights and duties of the parties under such agreements continue to apply until changed in accordance with the Railway Labor Act resolved that dispute with respect to this particular agreement as it did with respect to many others and with respect to the special board awards.

We have indicated that we do not object to a review of that fundamental issue as raised by this petition, if the petition in No. 683 is granted (pp. 4-9, *supra*). Should the Court agree with petitioners that the Congress intended the prior agreements and rules to be restored automatically upon expiration of the Award, that ruling would also apply to the situation as between the Richmond, Fredericksburg & Potomac Railroad Company and the Brotherhood of Railroad Trainmen. But petitioners' further contention, limited to that one situation, that there was no agreement at all, is meritless in view of the stipulated facts, and is without any general significance either in this case or in future litigation. As with the other minor issues raised by petitioners, we believe that the matter is not one which calls for review by this Court and that the consideration by this Court of the broad issues presented in No. 863 and by another aspect of the instant petition (see pp. 4-9, *supra*)[5] should not be complicated by extending the grant of certiorari to such minor issues. For these reasons, we

[5] Similar issues are also before the Court with respect to the expiration of the firemen's provisions of Award 282, in Nos. 859 and 933.

submit that the petition should be denied with respect to the issue stated as Question No. 4 in the petition (p. 3) and as Question No. 4 herein (p. 2, *supra*).

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 861

BROTHERHOOD OF RAILROAD TRAINMEN, SWITCHMEN'S UNION OF NORTH AMERICA, *Petitioners*,

v.

THE AKRON & BARBERTON BELT RAILROAD COMPANY, ET AL., *Respondents*.

PETITIONERS' REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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This reply brief is directed at the Respondents' response concerning two of the issues which Petitioners have asked this Court to review.

1. The first of these issues is whether the Court below was correct in holding that the Railway Labor

Act prohibits parties subject to the Act from entering into agreements of limited duration with the expressed intent that upon the expiration of the agreements the prior conditions of employment as modified by the agreements are again to become effective. The issue arose with respect to ten agreements which were of limited duration.

The Respondents contend that all that is involved is a matter of contract construction and the issue is not of sufficient importance to occupy the time of this Court. This contention is in error. The issue is concerned not only with the construction of contracts, but primarily with the construction of the Railway Labor Act.

The opinion of the Court below shows quite clearly that its holding that the substantive changes in work rules, resulting from agreements of limited duration, continue in effect upon the expiration of the Arbitration Award did not result from its interpretation of the agreements but from its interpretation of the Railway Labor Act. Indeed, the Court specifically so declared in its opinion of July 31, 1967. The Court stated (App. at 45a-46a):

> "Our ruling is that the work rules created by the Award constituted a new plateau that was not automatically eroded when the Award expired. . . . The ruling is not based on the Award, which had only a 2-year life, or on any agreement of the parties. The predicate of our ruling is, simply, the force of the Railway Labor Act. . . . This new plateau reasoning applies even though the work rules are established by agreements of limited duration. *'The effect of § 6 is to prolong agreements subject to its provisions regardless of what*

they say as to termination.'[17]'' (Footnote omitted, emphasis added.)

It is this ruling of the Court, dealing with the statutory construction of the Railway Labor Act as it relates to the contract-making power of the parties subject to the Act, which we seek to have reviewed by this Court. We submit the issue is of fundamental importance and one which is the proper concern of this Court.

2. The second issue upon which we feel compelled to respond concerns the dispute between the Petitioner Brotherhood of Railroad Trainmen and the Respondent Richmond, Fredericksburg and Potomac Railroad Company. In our petition, we conceded that this issue was not of sufficient importance in and of itself to warrant a grant of certiorari but that if this Court decided to review any of the basic determinations of the Court below it likewise should review that Court's holding with respect to this issue.

However, the Respondents' misstatement of the facts surrounding this issue cannot be permitted to stand unchallenged. The Respondents state that our position here that there was no agreement between the Brotherhood and the railroad was not raised heretofore, and that we had conceded in the Courts below that an agreement had been reached. This statement is not true.

The Respondents refer to the Stipulation entered into by the parties in the District Court on this issue which recites that the parties agreed that the railroad could make certain changes. The Respondents know full well, however, that that language was not intended as a concession by the Brotherhood that the corre-

spondence between the parties amounted to an agreement so as to preclude the Brotherhood from arguing to the contrary. They know this to be the fact because the matter was discussed at the time the Stipulation was prepared and they agreed that it would not so be used.

The Respondents point further to a statement taken from a pre-trial memorandum filed by the Brotherhood in the District Court in which it argued that the "only consensual arrangement agreed to by BRT was that the carrier could operate with crews smaller than prescribed in pre-existing rules 'until January 25, 1966.'" This too, Respondents assert, shows that the Brotherhood had taken the position that an agreement had been reached. The Respondents, however, omitted the remaining three sentences immediately following the sentence they quote. The rest of the paragraph reads:

> "The BRT never agreed to any proposal that meant anything else. If the agreement was not the agreement which the BRT said it was accepting, then there was no agreement between the parties reducing the requirements of the pre-existing crew-consist rules. Assuredly, the pre-existing crew-consist rules are now governing, either because the only agreement to reduce their requirements was to reduce them temporarily until January 25, 1966, or because there never was an agreement to reduce them at all."

The Brotherhood, contrary to Respondents' assertion, argued both in the District Court and in the Court of Appeals that the correspondence between the Brotherhood and the railroad did not result in agreement. The final letter of the railroad to the Brotherhood candidly admitted "that there is a difference

between the parties on the duration of the agreement." (R. 90) We again submit that if any part of the decision of the Court below is reviewed by this Court that this issue be reviewed as well.

Respectfully submitted,

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